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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1979

NO. 79-391

DAVID LEE LUKEFAHR,
STEPHEN DALE LUKEFAHR,
THOMAS P. LUKEFAHR
a/k/a THOMAS JAMES DAVISON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONERS

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The Petitioners, DAVID LEE LUKEFAHR, STEPHEN DALE LUKEFAHR, and THOMAS LUKEFAHR a/k/a THOMAS JAMES DAVISON, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The Court of Appeals for the Fifth Circuit filed an opinion on May 24, 1979. That opinion and the denial of the Petitioners' Petition for Rehearing En Banc appear in the Appendix hereto (Appendix J). The appellate decision is officially recorded as United States v. Capo, 595 F.2d 1086 (5th Cir. 1979).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 24, 1979. Thereafter, these Petitioners timely filed their Petition for Rehearing En Banc, which was denied on July 10, 1979. On July 31, 1979, an order extending time to file Petition for Writ of Certiorari was entered extending Petitioners' time for filing by thirty (30) days. This Petition for Writ of Certiorari has been filed within thirty (30) days of the entry of that order. The jurisdiction of the United States Supreme Court is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Fifth Circuit Court of Appeals failed to meet its Federal supervisory obligations by affirming Petitioners' convictions in a Federal criminal trial under a "mockery of justice" standard rather than the "probability of prejudice" standard mandated by this Court, where there has been a showing that inherently prejudicial pre-trial publicity inundated the community in which the trial was held.

2. Whether briefly questioning the jury as a group concerning a highly inflammatory, prejudicial article published during the trial was adequate to vindicate Petitioners' rights to a fair trial where the Trial Court was on notice that most of the unsequestered jurors subscribed to the publication in question, that these jurors had failed on previous occasions to follow the Court's instructions, and that the jurors had not responded truthfully or candidly during the pre-trial general voir dire concerning their exposure to prejudicial publicity.

3. Whether comments on Petitioners' post-arrest silence can be cleansed of the taint

of unconstitutional infringement on this Fifth Amendment right by reading and interpreting the remarks in the context of the argument in its entirety.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States, and the following Federal statutes and rules:

21 U.S.C.A. §841(a).

Prohibited acts A - Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; or

(2) to create, distribute, or or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. §846

Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

FED.R.CRIM.P. 21

Transfer from the District for Trial

(a) For Prejudice in the District. The Court, upon motion of the Defendant, shall transfer the proceeding as to him to another district whether or not such district is specified in the Defendant's motion if the Court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the Defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding Court in that district.

This case also involves the following quasi-statutory materials:

ABA STANDARDS FOR FAIR TRIAL AND FREE PRESS §3.4

Selecting the jury.

(a) Method of examination.

Whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept, by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what and how his exposure has affected

his attitude towards the trial, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have.

(b) Standard of acceptability.

Both the degree of exposure and the prospective juror's testimony as to his state of mind are relevant to the determination of acceptability. A prospective juror who states that he will be unable to overcome his preconceptions shall be subject to challenge for cause no matter how slight his exposure. If he has seen or heard and remembers information that will be developed in the course of the trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his judgment will be affected, his acceptability shall turn on whether his testimony as to impartiality is believed. If he admits to having formed an opinion, he shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial. A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind.

ABA STANDARDS FOR FAIR TRIAL AND FREE PRESS §3.5

(f) Questioning jurors about exposure to potentially prejudicial material in the course of the trial; standard for excusing a juror.

If it is determined that material disseminated during the trial raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The method of examination shall be the same as that recommended in section 3.4(a) above. The standard for excusing a juror who is challenged on the basis of such exposure shall be the same as the standard of acceptability recommended in section 3.4(b) above, except that a juror who has seen or heard reports of potentially prejudicial material shall be excused if the material in question would furnish grounds for a mistrial if referred to in the trial itself.

STATEMENT OF FACTS

This case arose from an alleged drug smuggling conspiracy, which resulted in an Indictment in the Northern District of Florida of Petitioners LUKEFAHR, along with David Capo and others. The events which gave rise to the Federal Indictment also resulted in a State of Florida murder charge against each of these

individuals. Your Petitioners LUKEFAHR were given full immunity from the State charges. The State and Federal cases were the subject of massive local news coverage in Tallahassee, Florida, where the trial took place. The case became known as the "Sandy Creek Smuggling Case" and the "Sinkhole Murder Case". (R. Vol. 2, p. 263).

The magnitude of the pre-trial publicity immediately prior to the trial of this case is set out in the Fifth Circuit opinion. (United States v. Capo, 595 F.2d 1089, n.2 [in three months preceding trial, twenty-one news stories in Tallahassee Democrat; one television station had run 120 different news reports connecting murders and drug offenses]). As a result, Petitioners filed a Motion for Change of Venue pursuant to FED.R.CRIM.P. 21(a). At the initial hearing on the Motion, Petitioners tendered into evidence numerous newspaper articles relating to these Petitioners and the alleged crimes, both State and Federal. (See, R.Vol. 5, pp. 49, 56; Defendants' LUKEFAHR Composite Exhibits 2, 3 [copies of the news-

paper articles published in locality]). The Trial Court preliminarily denied that Motion. (R.Vol. 5, p. 57; S.R. Vol. 3, p. 5).

Defense counsel then requested that each prospective juror be presented for voir dire in camera and on an individual basis. (S.R.Vol. 3, p. 51). The Trial Court granted that request. (S.R.Vol. 3, p. 128). After one day of voir dire, it became apparent that the large majority of prospective jurors had knowledge of the murders, evidence of which was inadmissible in the Federal trial. See, e.g., R.Vol. 6, p. 164.

After the first day of voir dire, Petitioners renewed their Motion for Change of Venue. (S.R.Vol. 4, p. 314).

At that hearing, the Petitioners presented evidence in addition to the newspaper articles which had previously been submitted. They tendered a survey taken in the local area which indicated substantial community exposure to publicity concerning the State and Federal crimes. (R.Vol. 6, pp. 33-95). Defense counsel also called to the witness stand a local

television newscaster. (R.Vol. 6, pp. 20-22). The newscaster testified about his television station's news broadcasts surrounding the State and Federal charges. The station broadcast approximately 120 segments relating to these Petitioners. (R.Vol. 6, p. 20). Each time facts about the Federal case were broadcast, the word "Murder" surrounded by a red patch to symbolize blood was displayed on the television screen. (R.Vol. 6, pp. 19, 22 [a copy of picture displayed for Court], App. G).

In further support of this Motion, Petitioners offered the testimony of Dr. Patrick Cook, a psychologist who had been present during the first day of voir dire. (R.Vol. 6, p. 96). This expert testified that when evidence about the Federal case was presented during trial, the jurors exposed to these newscasts would be susceptible to recall knowledge about the alleged murders because of the phenomenon of "paired learning" or "paired association". Dr. Cook also indicated that a primacy "effect of the use of the murder information might tend to influence the jurors'

judgment and reaction." (R.Vol. 6, p. 108). The Trial Court again denied Petitioners' Motion for Change of Venue, and voir dire commenced in the same fashion. (R.Vol. 7, p. 34).

Eventually, at least ninety percent (90%) of the jurors acknowledged some connection in their minds between the slayings and the drug offenses allegedly committed by Petitioners. See, App. A [excerpts of jurors' responses on voir dire relating to pre-trial publicity]. Many prospective members of the jury remembered highly significant and inflammatory information in great detail. (App. A [52 prospective jurors described details; six had very little or no knowledge]).

During the trial, Petitioners brought to the Court's attention an inherently prejudicial newspaper banner headline article which was published in the newspaper subscribed to by most jurors. See, App. E. Petitioners requested that an individual voir dire of the jury be conducted by the Court to determine the jurors' exposure to the article. The Court denied the request and asked the jury as a

group whether they had been exposed to the pre-trial publicity. (R.Vol. 16, p. 8). Accepting their assurances and expressing his faith in the jurors' ability to follow his instructions, the Court denied Petitioners' request for individual voir dire and proceeded with the trial. (R.Vol. 16, p. 9).

Finally, during his closing argument, the prosecutor commented to the jury that the Petitioners had failed to take the stand in their own defense. (S.R.Vol. 11, p. 196). Immediately thereafter, defense counsel requested a mistrial, which was denied by the Court.

On the 24th of February, 1978, the jury returned a guilty verdict against Petitioners LUKEFAHR pursuant to 21 U.S.C. §841 and 21 U.S.C. §846. The jury also returned a guilty verdict against the Defendant, David Capo. The remaining Defendants were acquitted.

Following the jury verdict in the Federal case, the Trial Court sentenced each of the LUKEFAHRS to the maximum penalties allowable under law - five (5) years' confinement and

$15,000.00 fine on each Count, with these sentences to run consecutively. (R.Vol. 4, pp. 561-563). The LUKEFAHRS moved for a new trial. The Trial Court denied that Motion. Thereafter, Petitioners LUKEFAHR timely filed their Notice of Appeal to the Fifth Circuit Court of Appeals. Oral argument was granted in that case, and on May 24, 1979, the Fifth Circuit Court of Appeals affirmed the convictions of these Petitioners. United States v. Capo, 595 F.2d 1086 (5th Cir. 1979). Petitioners filed their Petition for Rehearing En Banc, which was denied on July 10, 1979.

This Petition for Certiorari follows the denial of the Fifth Circuit Court of Appeals to rehear this case en banc.

SUMMARY OF ARGUMENT

I. Prior to the trial of the case, massive amounts of publicity inundated Tallahassee, Florida, where the trial was held. Most of the publicity was inherently prejudicial in nature. The Trial Court voir dired the jury initially as a group and later individually. Although during the voir dire as a group only one pro-

spective juror indicated that he had been exposed to publicity about the case or these Petitioners, during individual voir dire more than ninety percent (90%) of the prospective jurors had knowledge of prejudicial information. The Judge denied motions for change of venue, additional peremptory challenges and challenges for cause. The Fifth Circuit affirmed the Trial Court's action regarding this pre-trial publicity by finding that the Trial had not been reduced by this publicity to a "mockery of justice".

In so doing, the Fifth Circuit failed to fulfill its Federal supervisory obligation to insure that, in a completely Federal trial such as this, even the "probability of prejudice" or "unfairness" is avoided. By reviewing the entire trial in retrospect rather than analyzing the pre-trial publicity and juror exposure in the pre-trial setting without regard for the ultimate result, the Fifth Circuit failed to adequately insure a fair trial. The change of venue should have been granted prior to voir dire based on an adequate showing by the defense of community prejudice. Failing to do

this, the Trial Court should have granted the motion following voir dire where the Court was put on notice that the publicity had indeed inundated the community as evidenced by the exposure of the vast majority of these jurors. Instead, the Trial Court relied on the assurances of neutrality by the jurors despite evidence and reason indicating that these protestations of impartiality were unreliable.

While State Courts are held to the Due Process standard of fair trials, this Court has long demanded that in Federal trials, the Court's protection should exceed that standard when dealing with prejudicial pre-trial publicity. Because uniform application of the supervisory standard is non-existent within the various jurisdictions, a definite standard for Federal Courts must be set to guide District Courts in evaluating the prejudicial nature of pre-trial publicity.

II. Where an inherently prejudicial article is published in a local paper during the trial, the Trial Court must take appropriate in-depth measures to insure that jurors have not been

exposed to the article. In this case, the Petitioners proved that a majority of unsequestered jurors regularly subscribed to the newspaper in which this article was published, and that the article was prominently displayed as the banner headline article.

Because the Trial Court was aware that this jury failed to respond candidly when questioned as a group, the Court's brief questioning of the jurors concerning the article did not protect these Petitioners' Sixth Amendment rights.

III. The prosecutor, during his closing argument, commented on Petitioners' failure to testify at trial or after their arrest. The Fifth Circuit Court of Appeals recognized that, viewed by itself, the prosecutor's statement, when combined with his gesture toward these Petitioners, "appeared perhaps to be a remark on Defendants' failure to take the stand." However, the Court then approves of the remarks, stating that when viewed in the context of the entire argument, the remarks only rebutted the entrapment defense. The

novel interpretation of the remarks by the Fifth Circuit differs from both the Government's and that of the Petitioners. Moreover, these Petitioners did not allege entrapment as a defense.

Where the jury could have interpreted the remark as a comment on these Petitioners' failure to testify, it must be Constitutional error regardless of the context of the argument.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals for the Fifth Circuit is in direct conflict with holdings of the Courts of Appeals in other Circuits which require that the Court of Appeals use the "probability of prejudice" standard for granting change of venue.

Prior to the trial of this case, the Petitioners LUKEFAHR, pursuant to their Motion for Change of Venue, proffered evidence of pervasive community prejudice in the form of highly inflammatory publicity and intensive media coverage. Petitioners argued that in this circumstance, prejudice must be presumed, and that they had no duty to show actual jury bias.

See, Murphy v. Florida, 421 U.S. 794, 798-99 (1975); Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); Estes v. Texas, 381 U.S. 532, 542-43 (1965).

The Petitioners contended further at the Trial Court and Appellate Court levels that the proper standard for determining whether there was a "probability of prejudice" is set forth in numerous Supreme Court cases and codified by the American Bar Association in its Standards on Fair Trial and Free Press. Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); ABA STANDARDS, Fair Trial and Free Press §3.2(b) (1968). The ABA Standards state that proof of prejudice sufficient to require a change of venue may be made by "qualified public opinion surveys...as well as other materials having probative value." ABA STANDARDS, Fair Trial and Free Press, §3.2(b) (1968); cited in United States v. Chapin, 515 F.2d 1274 (D.C. Cir. 1975). In United States v. Chapin, the Court of Appeals for the Second Circuit stated that where commu-

nity passions are high, or publicity both localized and virulent, the Court should carefully consider whether the Defendants should even be required to prepare for a trial before a predictably hostile jury, and that a ruling on a Motion for Change of Venue should not automatically be postponed until voir dire. Id. at n.7.

The Petitioners proffered evidence prior to the voir dire of the jury indicating that there was massive, inherently prejudicial publicity in Tallahassee, Florida. The Fifth Circuit itself stated in its opinion, U.S. v. Capo, 595 F.2d 1089, n.2, that there was substantial evidence before the Trial Court to find that: (1) there was massive inundation of the community from which the prospective jurors were selected, and (2) that the contents of this publicity was inherently prejudicial to these Petitioners. Despite these conclusions, the Fifth Circuit failed to find reversible error in the Trial Court's denial of Defendants' Motion for Change of Venue or Request for Additional Peremptory Challenges. The Court did not explicitly set

forth what the Petitioners would have had to show for the Court to find the "probability of prejudice".

However, in an earlier case, the Fifth Circuit's analysis of the probability of prejudice standard was as follows:

> "[t]he test is no longer whether the prejudice found its way into the jury box at the trial...as we read the Supreme Court's case, the test is: where outside influences affecting the community's climate of opinion as to a Defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards such as a change of venue to insure a fair and impartial trial." United States v. Williams, 523 F.2d 1203, 1208 (5th Cir. 1975).

The contents of news articles concerning these Petitioners were inherently prejudicial. Both the Trial Court and the Fifth Circuit Court of Appeals recognized that the contents of these articles included statements of these Defendants' prior convictions, guilty pleas on similar charges and a connection between the drug smuggling case and the murders of four people. (App. C [linking Defendants in Federal case with State of Florida murder charges]; App. D [Defendants' prior criminal records].) (See, U.S. v. Capo at 1089, n.2, 1091, n.5). Such material has been held by this Supreme Court to be inherently prejudicial. See, Marshall v. United States, 360 U.S. 310 (1959) [subjective and editorial in nature]; United States v. Williams, 568 F.2d 464 (5th Cir. 1971).

Recognizing the inherently prejudicial nature of the publicity and instead of utilizing the probability of prejudice standard enumerated by the Supreme Court, the Fifth Circuit Court of Appeals stated that:

> "We do not believe that Appellants were subjected to prejudicial publicity of such a magnitude that it dominated the proceedings and reduced the trial to a mockery of justice..." Id. at 1091,

avoiding the appropriate standard of whether or not there was any probability of prejudice.

The Supreme Court standards, which should have been applied in the instant case, are as follows:

> "When a Defendant proffers evidence of pervasive community prejudice in the form of highly inflammatory publicity or intensive media coverage, prejudice is presumed and there is no further duty to establish actual prejudice." Murphy v. Florida, 421 U.S. 794, 798-99 (1975); Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); Estes v. Texas, 381 U.S. 532, 542-43 (1965); Pamplin v. Mason, 364 F.2d 1, 4-5 (5th Cir. 1966).

This standard implicitly requires that the Court make this determination prior to voir dire of the jury. Where the Defendant offers other evidence of community prejudice, such as that recommended by the American Bar Association, the Court should not voir dire the jury. The types of information presented at the trial below by Petitioners was exactly the variety suggested by the ABA, including: public opinion surveys, examples of inherently prejudicial publicity in massive amounts, and other objective evidence of the probability of community prejudice. As set forth in the preceding Supreme Court cases, a showing of actual bias is not required: a Judge should make his independent determination without regard to

voir dire of the jury. (Murphy v. Florida, Supra at 798-99; Sheppard v. Maxwell, Supra at 362; Estes v. Texas, Supra at 542-43).

However, the Fifth Circuit holds, in United States v. Capo, that the probability of prejudice standard requires that the Defendant must show:

> "Publicity of such a magnitude that it dominated the proceedings and reduced the trial to a mockery of justice." Opinion at p. 1091, United States v. Capo, at 1091-1092.

This standard conflicts with those set down by the United States Supreme Court and those established and followed by other Circuits. Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Tumey v. State of Ohio, 273 U.S. 510, 543 (1927); Sheppard v. Maxwell, 384 U.S. 333 (1966). See, Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966).

Moreover, the "mockery of justice" standard espoused by the Fifth Circuit is inherently unworkable where pre-trial publicity is at issue. In essence, this standard is an

evasion of the Court's obligation to determine prior to trial whether a "probability of unfairness" exists in the jurisdiction. See, Murphy v. Florida, 421 U.S. 794 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965). The standard set forth by the Fifth Circuit cannot be applied prior to trial. Nor does the Court imply that this is necessary. The Fifth Circuit merely concluded that the publicity in this case did not dominate the trial or reduce the trial to a mockery of justice. In so doing, the Fifth Circuit completely fails to give proper consideration to the effect of pre-trial publicity in and of itself. The effect of pre-trial publicity under the Court's Federal supervisory standard must be considered as an independent fact. This determination of whether the "probability of prejudice" or "unfairness" exists in the community must be made prior to trial. Therefore, the standard of "mockery of justice" is completely inapplicable to the required determination.

The "mockery of justice" standard as applied in the pre-trial publicity setting conflicts with the "probability of unfairness" standard. As one Court has stated:

> "Where community passions are high or publicity both localized and virulent, it might well be that a Court would carefully consider whether the Defendant should even be required to prepare for a trial before a predictably hostile jury and not automatically hold off ruling on the motion until voir dire..." United States v. Chapin, 515 F.2d 1274, 1286, n.7 (D.C. Cir. 1975).

As this Court reiterated in Nebraska Press Ass'n., et al. v. Stuart, 427 U.S. 539 (1976), citing Sheppard v. Maxwell, 384 U.S. 333, 362 (1966):

> "Given the pervasiveness of modern communication and the difficulty of effacing prejudicial publicity from the minds of the jurors, the Trial Courts must take strong measures to insure that the balance is never weighed against the accused..."

The Fifth Circuit has failed to apply this principle by establishing its mockery of justice standard.

A. The decision below raises an important issue with respect to the supervisory powers of the Appellate Court in reviewing the decisions of Federal District Courts which deny a change of venue or other procedural remedies in the face of massive, inherently prejudicial pre-trial publicity.

This is a strictly Federal criminal case, arising from Indictments delivered by the Federal Grand Jury and tried in the United States District Court for the Northern District of Florida. Therefore, the Fifth Circuit should have determined the case, exercising its Federal supervisory powers.

This Court has recognized the supervisory power of the Federal Appeal Courts, see, Barker v. Wingo, 407 U.S. 514, 530 n. 29 (1972), as well as its own supervisory power. See, e.g., Fay v. New York, 332 U.S. 261, 287, rehearing denied, 332 U.S. 784 (1947).

The power of the Court to determine cases based upon the supervisory power is long established. Moreover, in the exercise of this power, the Federal Courts may establish stand-

ards for their proceedings in addition to or more stringent than those required by due process. As this Court stated:

> "Over Federal proceedings, we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in State Courts, and these expressions of policy are not necessarily embodied in the concept of due process." Fay v. New York, Id. See also, McNabb v. U.S., 318 U.S. 332, rehearing denied 319 U.S. 784 (1943).

In the area of pre-trial publicity, this Court, in the exercise of its supervisory powers, has established a standard for reviewing claims of prejudicial pre-trial publicity. This standard, the probability of unfairness standard, is more stringent than the historic due process analysis. See, Irvin v. Dowd, 366 U.S. at 717 (1961) (concurring opinion of Chief Justice Berger); Rideau v. Louisiana, 373 U.S. 723 (1963) (dissenting opinion, Justice Clark).

Recognizing that a Federal supervisory standard has been established by the Supreme

Court, the issue is whether the Appellate Courts have a duty to impose the supervisory standards over criminal cases in which prejudicial publicity has been shown in lieu of applying the less vigorous due process requirements.

A well-reasoned and thorough analysis of the distinction between the Federal supervisory standard and the due process requirement in reference to pre-trial publicity is set out in the dissenting opinion of Circuit Judge MacKinnon in United States v. Haldeman, 559 F.2d 31, 145-161 (D.C. Cir. 1976) (App. H). In his dissent, Circuit Judge MacKinnon delineates the rules of presumptive prejudice versus the requirement of the showing of actual prejudice. Id. at 145. See also, Marshall v. United States, 360 U.S. 310 (1959); Murphy v. Florida, 421 U.S. 794 (1975).

This Court specifically set forth in Marshall that it would reverse the conviction based upon the exercise of its supervisory power to formulate and apply proper standards for enforcement of the criminal law in the

Federal Courts, and not as a matter of Constitutional compulsion. Id. at 313.

Under this standard applicable to the Federal Courts, a change of venue should be granted prior to voir dire of the jury where substantial prejudicial pre-trial publicity is shown.

In applying the standard to the instant case, substantial publicity containing inherently prejudicial information was widely disseminated in the community. As required by the above-cited case law, Petitioners met their burden by a thorough showing that this information was published, was prejudicial, and was circulated in the community from which these jurors were selected. See, Murphy v. Florida, 421 U.S. 794 (1975); Defendants' LUKEFAHR Composite Exhibits 2, 3, 14; R.Vol. 6, p. 20. App. A-D. See also, R.Vol. 2, pp. 258-262 [Motion for Change of Venue and Brief in Support thereof]. See, e.g., R.Vol. 5, pp. 34-57; Vol. 11, p. 395; S.R.Vol. 3, p. 5; S.R.Vol. 4, p. 298.

It is important to note that neither the Fifth Circuit Court of Appeals nor the Federal District Court trying this case specifically distinguished between the Federal supervisory and the Constitutional standards. In fact, the Fifth Circuit states in retrospect:

> "We note initially, at least, one Circuit has refused to invoke its supervisory powers to adopt a pre-trial publicity standard. United States v. Haldeman, 181 U.S. App. D.C. 254, 559 F.2d 31, 62-63 (1976). We likewise are hesitant to do so in this case... This Court questions whether a supervisory standard based on minimal exposure is essential to preserving an accused's right under Irvin to an impartial jury." United States v. Capo, 595 F.2d 1092, n.6.

The Fifth Circuit appears to be looking for guidance as to which standard should be applied. It appears that the Federal Appellate Courts can apply either the supervisory standards, which require a more stringent application of the concept of "probability of prejudice", or the Constitutional due process standard, which would require actual prejudice, or possibly the "mockery of justice" standard

actually applied in the instant case. There are no articuable means of discerning which standard an Appellate Court should apply in any given case. The Petitioners urge this Court to articulate the proper application of the supervisory standard holding that it should be applied in every instance in which the case is strictly "Federal".

In utilizing its supervisory power, the Federal Court must be guided in knowing first, whether the standard must be applied uniformly to all appellate review of District Courts' findings in reference to pre-trial publicity; and secondly, some standard must be enumerated as guidance for the Appellate Courts in determining whether a Judge has abused his discretion in finding that despite massive, inherently prejudicial pre-trial publicity the Defendants could receive a fair trial. The ABA Standards surrounding this decision are instructive and helpful. See, ABA STANDARDS, §3.4(b), Supra.

In its commentary, the ABA authors write: "As shown by such cases as People v. Martin,

243 N.Y.S.2d 343 (1st Dept. 1963); Delaney v. United States, 199 F.2d 107 (1st Cir. 1952); and Rideau v. Louisiana, 373 U.S. 723 (1963), there are occasions when the inherently prejudicial nature of the material, coupled with knowledge of its wide dissemination in the community, requires the granting of relief without elaborate soundings of community sentiment. In such instances, change of venue may be particularly appropriate when it can be shown that the news coverage has been far less pervasive in some other location within the jurisdiction."

Therefore, according to some interpretations of the Federal supervisory standard:

> "In light of Murphy and Marshall, the law is now that presumptive prejudice is a factor that must be examined in venue decisions...if the Federal standard for presumptive prejudice exists at all, it requires the Trial Court to recognize the possibility of presumptive prejudice." United States v. Haldeman, 559 F.2d 31 at 149 (5th Cir. 1976) (dissenting opinion).

While Supreme Court cases in the past appear to mandate that the Federal Appellate Courts and District Courts apply a standard for reviewing prejudicial publicity, some Districts have held that it is inappropriate to attempt to formulate a supervisory power standard for concluding that a fair jury could not be selected. United States v. Haldeman, Id. at 62. See also, United States v. Capo, at 1097, n.6; Rideau v. Louisiana, 373 U.S. 723 (1963) (dissenting opinion of Justices Clark and Harlan).

At the same time, many Courts have explicitly recognized that the Supreme Court, by exercising its supervisory power over the Federal Courts, could establish specific standards to be applied in all Federal cases. See, e.g., United States v. Gullion, 575 F.2d 26 (1st Cir. 1978). This power does not extend to State Court proceedings.

The Federal Courts have failed to expand protection to a criminal Defendant from prejudicial pre-trial publicity. In fact, some State Supreme Courts have outpaced the Federal

Courts in deciding which elements must be considered in determining whether a change of venue should be granted under their supervisory powers. See, e.g., Commonwealth v. Casper, 375 A.2d 737 (Pa. Sup. 1977). Whether these States have adopted this clearer standard because of due process or other reasons, the Federal Courts should lead the way in this crucial area.

Under the facts and circumstances of the instant case, the Court of Appeals should have utilized its supervisory powers in reviewing the decision of the Federal District Court. By so doing, it would have been compelled to find that it was harmful error for the Trial Court to fail to grant the Petitioners' Motions for Change of Venue or other procedural remedies requested in the face of the massive prejudicial pre-trial publicity.

This Court, by establishing a policy for applying the Court's supervisory standard, should find that the Fifth Circuit erred by failing to exercise that power. Moreover, the standard set by the Fifth Circuit's failing to

comply with the Federal standard was erroneous. Under the proper analysis, the Trial Court below erred by failing to evaluate, prior to the trial, whether the publicity published before the trial created the probability of unfairness or prejudice.

B. The decision of the Court of Appeals for the Fifth Circuit and those of other Circuits fail to delineate articuable standards for determining whether the probability of prejudice "is so great from prejudicial pre-trial publicity that a change of venue should be granted prior to voir dire".

Once this Court has recognized a Federal supervisory standard, the Court must further specify some standard for reviewing the Trial Court's determination. Failure of the Courts to articulate guidelines permits an arbitrary application of the supervisory power. Uniform application would lend more guidance to our Trial Court Judges. At present, two District Courts, even within the same jurisdiction, when presented with cases similar in the quantity and

quality of prejudicial pre-trial publicity, may reach different results. This may result from the application of the supervisory standard in one case and the due process standard in the other. See, e.g., United States v. Capo, 595 F.2d 1086 (5th Cir. 1979), compare with United States v. Herring, 568 F.2d 1099 (5th Cir. 1978); United States v. Williams, 568 F.2d 464 (5th Cir. 1971).

The discrepancy in application is apparent even within the Fifth Circuit. As stated above, the Fifth Circuit panel in the instant case failed to apply the Federal supervisory standard of avoiding even the possibility of prejudice. United States v. Capo, Supra. In an earlier case, the Fifth Circuit stated:

> "It is plain that the Marshall rule is considerably broader than the Constitutional standard and provides more protection against prejudice...
>
> "...This Court, in cases involving Federal Trials, has not clearly distinguished between the Marshall rule and the Constitutional standard." United States v. Williams, 568 F.2d at 469.

The Williams decision was not referred to by the Court in the instant case.

Articuable standards which are clear and specific are possible. The standards set forth by the State of Pennsylvania are illustrative.

In the case of Commonwealth v. Casper, 375 A.2d 737 (Pa. Sup. 1977), the highest Court in the State of Pennsylvania set forth the following elements to be considered in deciding whether a criminal Defendant is entitled to a change of venue:

> "1. The extent of the pre-trial publicity.
>
> 2. The nature of the pre-trial publicity.
>
> 3. The nature of the community which was subject to the pre-trial publicity, and where the trial was scheduled to take place.
>
> 4. The source or sources of the pre-trial publicity, including the possibility of prosecutorial misconduct, in creating an atmosphere of hostility towards the accused; and
>
> 5. The familiarity of the accused's name with the local populace prior to the time when charges were brought

against him for which he is being tried."

Id., at 743.

That Court continued, in applying these elements:

> "...We hold that the above elements must be considered by the Trial Court in each such case. It is not necessary that all of the above elements be present before change of venue is mandated in order to insure fair trial. Any element set forth above, or any combination of the above elements, may be sufficient to make a change of venue in order to insure that the Defendant receives a fair trial.
>
> "If a review of these elements indicates that the pre-trial publicity is of such magnitude so as to make it impossible for the Defendant to receive a fair trial in a particular community, then a change of venue must be granted, irrespective of what is revealed during the voir dire of the jurors. Rideau v. Louisiana; Commonwealth v. Pierce, 451 Pa. 190, 303 A.2d 209 (1973)." Casper, at 743 [emphasis supplied].

The Pennsylvania guidelines as set forth above direct the Trial Courts in that State as to what will or will not be tolerated in terms of

pre-trial publicity. The failure of the Federal Appellate Court to delineate standards for reviewing Trial Court determinations allows the lower Federal Courts broad latitude in determining whether the publicity creates a "probability of prejudice." The arbitrary use of this discretion, lacking adequate guidelines, deprives a Defendant in a criminal case of the probability of receiving a fair trial. Aside from these substantive problems, the lack of certainty and the ambiguity which necessarily results from this situation impose additional unwarranted and unnecessary burdens on the attorneys and Courts alike.

The instant case is a clear example of the situation where the Federal supervisory power should have been invoked. The facts demanded that the Trial Court find, prior to the voir dire of the jury, or at any time during the voir dire of the jury, that there was a probability of prejudice. This conclusion is warranted by the showing made by the Petitioners prior to trial as to: (1) the substance and quantity of prejudicial pre-trial publicity; (2) the opinion

survey taken in the community; (3) testimony of the psychologist indicating that the jurors were potentially prejudiced; and (4) the nature of the circumstances of this case, which involved publicity concerning these Petitioners in connection with a State murder charge as well as the Federal smuggling charges, which could not be separated in the minds of the jurors. As the Court of Appeals set forth in its opinion:

> "In the three months preceding trial, approximately 21 stories concerning the offenses were published in the Tallahassee Democrat, the city's largest paper...moreover, it was shown that since the occurrence of the offenses, a local television station had run 120 different news reports linking the murders and the drug offen . During those newscasts, the word 'murder' surrounded by a red patch symbolizing blood was flashed on the screen. It was estimated that each newscast reached over 200,000 people." See, App. C and D; (App. G); United States v. Capo, Supra at 1089, n.2.

The publicity of this case was highly localized in Tallahassee, even though the murders took place in Panama City, Florida

(some 100 miles west of Tallahassee). The publicity was disseminated almost entirely from Tallahassee. The Tallahassee Democrat, the largest circulating newspaper, was published there as were all local news broadcasts. On numerous occasions, Petitioners demonstrated to the Trial Court that publicity concerning this case was limited to the northern region of Florida. No national broadcasts about this case appeared, nor did the Government present evidence to the contrary. Therefore, a change of venue would have readily solved the probable prejudice incurred by the massive prejudicial pre-trial publicity.

In the event that the Trial Court is not persuaded prior to voir dire that the probability of prejudice exists, the Court should still be responsible for insuring that the probability of prejudice does not exist prior to conducting voir dire of the jury venire. Sheppard v. Maxwell, 384 U.S. 333 at 361 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961). Even the Government appears to have expressed

a belief prior to completion of the voir dire that a fair trial was less than probable. Following the first day of voir dire in the instant case, the Assistant United States Attorney expressed his doubts that an impartial jury could be selected in this locality. (R.Vol. 6, p. 164). He expressed that belief in a newspaper interview while jury selection was underway. (R.Vol. 6, p. 164). While the impropriety of the prosecutor's remarks should not be overlooked, the fact remains that substantial evidence showed pervasive community prejudice. The resulting probability of unfairness in this case required suitable procedural safeguards. The Trial Court should not have continued to conduct voir dire examinations where Petitioners had proved this probability of prejudice. See, App. A, B; Sheppard v. Maxwell, 384 U.S. 333 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963).

Where specific standards are not set for reviewing a District Court's denial of Defendants' change of venue motion, Appellate Courts are free to set standards which are onerous.

See generally, Broeder, Voir Dire Examinations: An Empirical Study, 38 SO.CAL.L.REV. 503 (1969) at 619, citing State v. Rogers, 241 La. 841, 132 So.2d 819 (1961) [publicity included Defendant's prior record and confession, most jurors were friends of deceased and coroner had been quoted as saying that if there was going to be any "necktie party", he'd like to be in it].

In actuality, although this Court has indicated that only a probability of prejudice need be shown, Petitioners here are forced to show actual jury prejudice through voir dire before the Fifth Circuit and other Circuits will reverse the discretionary decision of a Trial Court.

> "...[A]ppellate review concentrates on the nature and effect of the pre-trial publicity as revealed during voir dire. Without some showing on the record of actual prejudice from the publicity, most Appellate Courts refuse to overrule the decisions of the Trial Judge. See, e.g., United States v. Agueci, 310 F.2d 817 (2nd Cir. 1962) [jurors' exposure to reports of murdered prosecution witnesses held not to demonstrate prejudice];

> Sargent v. People, 497 P.2d 983 (1972) [insufficient exposure to prosecution's release of grisly details]; State v. Thomas, 94 Idaho 430, 489 P.2d 1310 (1971) [no abuse of discretion despite extensive exposure to reports of murder of popular local policeman]." 38 SO.CAL.L.REV. 503 at 619.

This violates the principles set forth by this Court.

C. The decision of the Court of Appeals for the Fifth Circuit conflicts with findings of other Circuit and District Courts that refuse to accept juror assurances of impartiality where prejudicial contamination of the jury has been shown.

In the instant case, Petitioners presented to the Court substantial evidence of massive pre-trial publicity. (See, R.Vol. 5, pp. 49, 56; App. C and D [copies of newspaper articles published in locality]; R.Vol. 6, pp. 33-95; R.Vol. 6, pp. 20-22; App. G [copy of picture from local newscasts]. The Court denied Petitioners' Motion for Change of Venue and proceeded to voir dire the jury as a group. During that general examination, the Court

inquired as to whether any juror had been exposed to pre-trial publicity. Of all the prospective jurors, only one indicated that he had some exposure. Petitioners then requested an individual voir dire of the jury, which was granted by the Trial Court. During that examination, the voir dire revealed:

> "As a result of media coverage of the smuggling operation and the Sinkhole Murders, a significant percentage of the prospective jurors, estimated at ninety (90%) percent by Appellants, possessed at least minimal knowledge of the murders, evidence of which was obviously inadmissible in the Federal trial, and the connection between the slayings and the drug offenses allegedly committed by Appellants." United States v. Capo, 595 F.2d at 1089; App. A [excerpts from voir dire of prospective jurors]; App. B [excerpts and citations to remarks made by jurors eventually empanelled.]

Moreover, in reviewing this case, the Fifth Circuit recognized that each juror empanelled had some actual knowledge of the Sinkhole Murders, but stated that each had repeatedly pledged his or her impartiality during the voir

dire examination. As the Circuit Court stated in its opinion:

> "Most of the potential jurors who were cognizant of the murders repeatedly professed to impartiality in that they had no fixed impression or opinion as to guilt or innocence." United States v. Capo, 595 F.2d at 1091.

Petitioners, in their Brief to the Fifth Circuit Court of Appeals, specifically enumerated as error the Trial Court's reliance on jurors' assurances of their own ability to remain neutral, despite the finding that the jurors had in fact been exposed to prejudicial pre-trial publicity. (See, Defendants-Appellants LUKEFAHRS' Brief, pp. 14-18). During oral argument, Petitioners specifically requested that the Fifth Circuit adopt the ABA Standards for Fair Trial and Free Press, §3.4(b). Under that Standard, the Court should have upheld the Petitioners' objections for cause to jurors who had knowledge of highly inflammatory or significant information without regard to the testimony as to each juror's state of mind. See, Appellants LUKEFAHRS' Brief, p. 14.

The Fifth Circuit, in this case, appears to revert back to older Supreme Court cases which express great faith in a juror's ability to gauge his own impartiality. Adams v. United States ex rel. McCann, 317 U.S. 269, 281 (1942); Spies v. People of Illinois, 123 U.S. 131. However, more recent decisions of this Supreme Court, recognizing the pervasiveness and power of today's mass communications, conclude that despite a juror's best good faith efforts to remain unbiased, it is highly probable that publicity will have a substantial conscious or subconscious affect on a juror's judgment and verdict. Estes v. Texas, 381 U.S. 532, 544 (1965). As pointed out by defense counsel and documented by expert testimony, the subconscious pairing by jurors of the pre-trial publicity concerning murder with the crime of smuggling did in fact bias the jurors despite their protestations of impartiality.

While it may be beneficial to provide a method of jury qualification that will promote the exclusion of prospective jurors infected with prejudices of the community from which they

come, this protection, as Irwin v. Dowd, 366 U.S. 717 (1961) shows, is not always adequate to effectuate the Constitutional guarantee of an impartial jury. Groppi v. Wisconsin, 400 U.S. 505, 510 (1971). In the case of Rideau v. Louisiana, 373 U.S. 723 (1963), this Court held that only a change of venue was Constitutionally sufficient to assure the kind of impartial jury that is guaranteed by the Sixth Amendment.

Nonetheless, some Circuit Courts of Appeals continue to affirm Trial Court decisions where it is clear from the voir dire transcript that jurors had been exposed to highly prejudicial materials through the news media where those jurors assured the Court that they would retain their impartiality. See, e.g., United States v. Hall, 536 F.2d 313, 326 (10th Cir. 1976); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976). See also, ABA STANDARD RELATING TO FAIR TRIAL AND FREE PRESS, Commentary, Supra, p. 21 at 126.

The essence of this attitude towards the jury has long precedent in the United States.

Adams v. United States ex rel. McCann, 317 U.S. 269, 281 (1942); Spies v. People of State of Illinois, 123 U.S. 131. Nonetheless, numerous Courts have taken a more realistic approach to the problem of juror assurances.

Other Courts have held that whether a juror can render a verdict based solely on the evidence adduced in the Courtroom should not be adjudged on that juror's own assessment without something more. United States v. Largo, 346 F.2d 253, 257 (7th Cir. 1965) (dissenting opinion), cert. den'd. 382 U.S. 904 (1965); and compare Sheppard v. Maxwell, 346 F.2d 707, 751 (6th Cir. 1965) (dissenting opinion), rev'd. 384 U.S. 333 (1966); Groppi v. Wisconsin, 400 U.S. 505 (1971).

Once a Trial Court has accepted the jurors' assurances of their ability to remain impartial, an undue hardship is placed on a criminal Defendant. This is particularly true where the Trial Court failed to affirmatively determine whether or not the "probability of prejudice" existed. As the D.C. Circuit Court stated in United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976):

> "Irvin established a 'common sense standard' of juror qualification. United States v. Caldwell, 543 F.2d 1333, 1346 (D.C. Cir. 1974), cert. den'd. 23 U.S. 1087 (1976). In keeping with that approach, a Defendant who claims he was denied a fair trial because the jury was not sufficiently 'indifferent' generally must sustain that claim 'not as a matter of speculation but as a demonstrable reality.' U.S. ex rel. Darcy v. Handy, 351 U.S. 454, 462 (1956). This demonstration can be made only by reference to the voir dire. In 'extreme circumstances', however, prejudice to the Defendant's rights may be presumed." (Citations omitted). United States v. Haldeman at 60.

Under Haldeman, once a jury is voir dired by a Trial Court, the "probability of prejudice" standard no longer applies. Therefore, Haldeman indicated that once a jury has been qualified under the discretion of the Trial Court Judge, the Defendant must show actual prejudice to the jury before he can reverse the conviction. The D.C. Circuit does make an exception to this general rule requiring actual jury prejudice in such instances by saying that "in extreme cases", prejudice may be presumed.

The D.C. Circuit does not go on to enumerate or give an example of what an extreme circumstance might be, and indicates that the presumption is not mandatory, but may in fact once again be discretionary.

The standard of the D.C. Circuit requiring a showing of actual prejudice is in direct conflict with the principles enumerated by the Fifth Circuit, as well as those indicated by the Ninth Circuit. See, United States v. Williams, 568 F.2d 464 (5th Cir. 1971); Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968). Independent appraisals of the value of voir dire to discover jury prejudice indicate that as a whole, the process produces unreliable information. Several of these evaluations suggest that Appellate Courts should place less faith in voir dire. As the authors of the American Bar Association Standards for Fair Trial and Free Press state:

> "It has in many jurisdictions been common practice for denial of such a [change of venue] motion to be sustained if a jury meeting prevailing standards could be obtained. There are...difficulties with the approach...many existing

standards of acceptability tolerate construable knowledge of the case, and even an opinion of the merits on the part of the prospective juror. And even under a more restrictive standard, there will remain the problem of obtaining accurate answers on voir dire - is the juror consciously or subconsciously harboring prejudice against the accused resulting from widespread news coverage in the community? Thus, if change of venue and continuance are to be of value, they should not turn on the results of the voir dire; rather, they should constitute independent remedies designed to assure fair trial when news coverage has raised substantial doubts about the effectiveness of the voir dire standing alone." ABA STANDARDS, Supra, p. 21 at 126 (emphasis added). Cited in United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (dissenting opinion).

In this case, many jurors remembered highly significant , inflammatory material. The statements of juror Mary Mercer during voir dire are illustrative:

THE COURT: Uh-huh. Do you recall anything about the bodies, where they were from, whether they were --

MS. MERCER: It was two sisters there. One was sixteen. The other one I believe was

about fourteen. And there were two young men involved. One, I believe, was a married man. They were from the general Panama City area, somewhere between Tallahassee and Panama City. And then recently, the truck that was apparently owned by one of those was pulled up and there was a section, the camper section, or something, missing from the truck. And allegedly, this is the vehicle that was involved. And I think what I got from that was the speculation that those persons may have been witnesses to the unloading of the marijuana, and that they, in fact, may have been killed as a result of this. And the speculation is that there may be some more things to be uncovered in the future.

THE COURT: Uh-huh. But you relate that to this case?

MS. MERCER: I do. And I've been trying to sort out what the direct relationship was, if there is one, and it seems that if there was a more thorough investigation after --after the bodies were brought up. And there was some kind of link." (Emphasis supplied.) R.Vol. 11, pp. 68-69.

Ms. Mercer was the foreman of the jury which convicted the Petitioners.

Even where the jurors fail to remember particulars from pre-trial publicity, they may form lasting, general opinions and impressions. One study described at length by Rudolph Flesch, in his book, The Art of Clear Thinking (Collier-McMillan), 165-166 (1969), indicated that while those studied forgot the details of the film shown to them, its message and the opinion they had formed increased. Therefore, as the dissent in United States v. Haldeman, concluded:

> "Thus, the circumstance that prospective jurors stated they could not recall particulars did not negate the strong possibility that they had formed and retained some general opinions about what they had seen and heard." Id., at 155.

All of this assumed that jurors on voir dire are attempting in good faith to honestly report their own impartiality. Despite the history of this assumption in American jurisprudence, it has been documented in numerous situations that "veniremen freqently deceive, many times consciously." Broeder, Voir Dire Examinations: An Empirical Study, 38 SO.CAL.

L.REV. 503, 513. From the voir dire here, the Trial Court in this instance was on notice that these jurors were hesitant to respond fully and accurately to the Court when questions were propounded to the group. See, R.Vol. 16, p. 9.

Moreover, here, after the first day of voir dire, the Trial Court propounded questions to the prospective jurors which were calculated to evoke, or had the effect of evoking, responses demonstrating impartiality on the part of the jurors. See, e.g., R.Vol. 9, pp. 71-75; Vol. 11, pp. 70-71. The Court's questions became leading and highly suggestive. Moreover, the Court frequently suggested the answer to the juror prior to asking the question. One example is the following exchange during voir dire:

> THE COURT: If someone were to ask you that you believed the crimes charged here in this indictment have now been committed, your answer would be what?
>
> MS. OVERSTREET: I really don't know.
>
> THE COURT: Your answer would be no?

MS.
OVERSTREET: No, they haven't.

THE COURT: Yes, it maybe was not a fair question.

MS.
OVERSTREET: Yeah.

THE COURT: Because the burden is on the government to prove that the crimes were committed and these defendants committed them.

MS.
OVERSTREET: Right.

THE COURT: All right. All right.

MS.
OVERSTREET: Uh-huh.

THE COURT: Any problem?

MS.
OVERSTREET: No.

(R.Vol. 9, pp. 75-76).

As was set forth in the dissenting opinion in Haldeman, a juror's natural inclination would be to deny opinions after the Court has suggested that those opinions are contrary to those of the Court or contrary to the law. The Court, in asking certain questions, appeared to be "merely going through the form of obtaining jurors' assurances of impartiality", and this is "insufficient [to test that impartiality]." United

States ex rel. Bloeth v. Denno, 313 F.2d 364, 372 (2nd Cir. 1963), cert. denied 372 U.S. 978 (1963).

The facts in the instant case are analagous to the facts set forth in the leading case of Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968). In that case, each and every juror had heard something about the Appellant's case. Despite jurors' assurances of impartiality, the Court quoted from Irvin v. Dowd in reversing the lower Court decision:

> "No doubt each juror was sincere when he said that he would be fair and impartial...but the psychological impact requiring such a declaration before one's fellows is often its father." Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968).

While our system of justice is based on the integrity of the jurors, it would be reckless to disregard the realities of present day media contamination of prospective jurors. Despite the integrity of individual jurors, and their own belief and confidence in their ability to be impartial, substantial evidence exists which points to the undeniable conclusion that jurors are

frequently subconsciously or consciously prejudiced by pre-trial publicity. Broeder, Voir Dire Examinations: An Empirical Study, 38 SO. CAL.L.REV. 503 (1969). In addition, many jurors exposed to pre-trial publicity consciously desire to remain on jury panels despite their possible prejudice, due to their interest in the case as excited by pre-trial publicity. A juror's enthusiasm for fulfilling his obligations as a citizen in serving on a jury is certainly commendable; however, where the juror is motivated by factors which may very well impair his ability to remain impartial, the Court must insure that such a biased juror not impinge on a Defendant's right to an impartial trial.

Some limitations must be placed on the discretion of the Trial Court to accept the assurances of prospective jurors of their own impartiality. Not in all cases or under all circumstances, but this duty must extend at least to those situations in which there has been a showing of pervasive pre-trial publicity.

Despite all good intentions, a juror is not always the best judge of himself. Estes v. Texas, 381 U.S. 532, 544 (1965).

II. The decision of the Court of Appeals for the Fifth Circuit holding that the Trial Court's general voir dire of the jury regarding their exposure to inherently prejudicial mid-trial publicity, when combined with the Court's instructions, conflicts with decisions of other Circuit Courts.

During the course of the trial, the Tallahassee Democrat, the largest circulation newspaper in the Tallahassee area, featured a front page headline reading, "CONVICTS LIVED IT UP HERE - - WHILE THEY COULD", with the sub-headline, "Witness Recounts Threat on Life". (App. E). Defense counsel offered a copy of this article in open Court, out of the hearing of the jury, and requested that the Judge conduct a voir dire of each juror individually in reference to their exposure to the article and headline. (R.Vol. 16, pp. 5, 9). In making his request, counsel described the contents of the article, which were inherently

prejudicial. (R.Vol. 16, p. 9; App. E). The Court refused to individually voir dire the jurors, and merely conducted a general questioning of the jury as a group. (R.Vol. 16, p. 8).

On appeal, the Defendants, citing among other cases United States v. Herring, argued for the adoption of American Bar Association Standards for Fair Trial and Free Press §3.5(f) (1968). United States v. Herring, 568 F.2d 1099 (5th Cir. 1978); Defendants LUKEFAHRS' Brief, pp. 27-32. The Fifth Circuit Court of Appeals, in Herring, Supra, had approved the procedure recommended by the American Bar Association for dealing with publicity which occurs during the trial. As the Court of Appeals recognized in this case,

> "Where material disseminated during the trial 'goes beyond the record' of the trial and 'raises serious questions of possible prejudice', the Trial Court is to inquire of each juror about his or her possible exposure to the material out of the presence of other jurors." Herring, 568 F.2d at 1104; cited in United States v. Capo, 595 F.2d 1086, 1093 (1979).

In the Herring decision, and under the ABA Standard, a two-step determination must be made by the Court prior to individual examination of the jurors. The Court must first decide whether the matter goes beyond the record and is seriously prejudicial in content. Second, the Trial Judge is to determine the likelihood that the material reached the jury.

Both Courts below recognized that the publicity went beyond the record and was inherently prejudicial in content. United States v. Capo, 595 F.2d at 1089. See also, United States v. Lord, 565 F.2d 831, n.7 (2nd Cir. 1977); Marshall v. United States, 360 U.S. 310 (1959); Murphy v. Florida, 421 U.S. 794, 798 (1975).

However, in reviewing the Trial Court's determination of the second step of the ABA test, whether or not it was likely that the jury was exposed to the prejudicial material, the Fifth Circuit Court of Appeals erred. The Court was aware of the prominence of the

headline in the Tallahassee Democrat, and of the inherently prejudicial nature of the article. Moreover, the Court recognized that at least six jurors had daily subscriptions to the newspaper and four other members purchased it on a regular basis. United States v. Capo, at 5195, n.2; App. F. The jurors were not sequestered, and because most received copies of the Tallahassee Democrat in their homes, and since the above-referenced article was a front-page story, it can only be assumed that the Court rested its entire determination as to the second phase of the test on the Trial Court's instructions to the jury. The Fifth Circuit states, in United States v. Capo, at 1093:

> "...the Trial Judge reasoned that he had instructed the jury not to read anything about the trial, they had followed these instructions and if they had read the article, a collective inquiry would reveal it. This manifested the Court's belief that the material had not been disseminated to the jury, a conviction that was confirmed by the jurors' negative responses to the Court's questions."

By so concluding, the Fifth Circuit has deviated from other Circuits in several ways. First, the Fifth Circuit ignores the reality, which has been accepted by other Circuits, that jurors frequently breach Courts' instructions. Second, where the Trial Court has been previously put on notice that jurors had failed to respond properly or completely truthfully to questioning as a group, the Court continues to affirm this type of generalized inquiry. Finally, the Fifth Circuit has accepted nothing more than a general questioning of the jury, where this manner of questioning has been held inadequate by other Circuit Courts.

While the Fifth Circuit affirms in this case on the grounds that the Trial Court acted properly in basing its failure to individually voir dire the jury on its belief that the jurors would follow directions, such idealism was unwarranted in this case. It is obvious from the record of the case that jurors had failed to observe the Court's instructions. For example, during voir dire, several prospective jurors

admitted breaches of the Trial Court's instructions that they not read, or discuss this case, and that they not listen to discussions of the case outside the Court. (R. Vol. 11, p. 68; Vol. 10, p. 365.) On another occasion, one juror described a prohibited conversation with another juror, and stated in explanation, "people do talk no matter what you tell them to do." (R. Vol. 10, p. 46.) Moreover, even if these jurors had attempted to follow the Court's instructions not to read, hear or discuss "this case", the jurors could have misinterpreted the instruction, concluding that it limited only their reading in regard to the Federal smuggling case while continuing to view publicity concerning the State murder case. This continued to prejudice the Petitioners where prejudicial materials about them were broadcast on either the State or Federal cases. See, Defendants LUKEFAHRS' Brief, pp. 33-36 [analysis of various interpretations of Court's instructions].

Moreover, other Circuits have taken the more realistic approach that Courts cannot close their eyes to the realities that jurors may be

tempted by prominently displayed prejudicial publicity. Petitioners do not argue that all jurors in all Federal cases must be sequestered; the relief they seek is much more limited. It is most important that this Court set guidelines to be followed by Federal District Courts when confronted with the problem of actual publication or broadcast of prejudicial information concerning an on-going criminal trial. See, United States v. Lord, 565 F.2d 831, 838 (2nd Cir. 1977), citing, ABA Project on Minimum Standards for Criminal Justice, Fair Trial and Free Press §3.5(f).

The conflict between Circuits willing to recognize the realities of mass news media and juror disobedience of instructions, and those which maintain the concept of jurors' ability to recognize and then totally disregard prejudicial publicity, are apparent in several cases. For example, the Second Circuit, taking the more realistic approach, is illustrative:

> "In our view, the District Court erred in relying solely on repetitive admonitions to the members of the jury to avoid news coverage of the

> trial...the widespread availability of newspapers as well as the prominent position occupied by the article created a strong possibility that some jurors might have been exposed to the irrelevant and prejudicial matter in the publicity.
>
> "Under such circumstances, it is not enough to assume that jurors will faithfully observe general cautionary instructions, in view of some experience to the contrary. See, e.g., Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968) [juror ignored instructions and kept collection of newspaper clippings pertaining to trial]." United States v. Lord, 565 F.2d 831, 838-9 (2nd Cir. 1977).

In direct contrast to this, was a statement made recently by the Ninth Circuit Court of Appeals. Therein, the Ninth Circuit stated:

> "The Supreme Court has said that our whole jury system is based upon the recognizability of the juror to follow instructions. Opper v. United States, 348 U.S. 84, 95, 75 S.Ct. 158 (1954). Moreover, we are required to assume that the jury followed instructions. United States v. Strand, 574 F.2d 993, 996 (5th Cir. 1978)." [Further citations omitted.] United States v. Brady, 579 F.2d 1121, 1127 (9th Cir. 1978).

However, other Circuits have implicitly recognized that jurors fail to follow the Courts' instructions. See, e.g., United States v. Concepcion Cueto, 515 F.2d 160 (1st Cir. 1975) [jurors deliberating on case were exposed to publicity, despite Trial Court's instructions that they not read about the case. Court of Appeals notes that even in camera individual voir dire was conflicting.] United States v. Titsworth, 422 F.Supp. 587 (D.C. Neb. 1976) [some jurors admitted hearing newscasts, or being told of newscasts].

Despite our long-held belief that jurors will follow Courts' instructions, the temptation of viewing massive mid-trial publicity may be too great for many jurors. "The jury is an essential instrumentality - an appendage - of the Court, the body ordained to pass upon guilt or innocence." Sinclair v. United States, 279 U.S. 749, 765. Nonetheless, as Mr. Justice Holmes stated,

> "Any Judge who has sat with juries knows that, in spite of forms they are extremely likely to be impregnated by the environmenting atmosphere." Frank v. Mangum,

237 U.S. 309, 349 (dissenting opinion). See, Turner v. Louisiana, 379 U.S. 466, 471-72 (1965).

There may well be examples in each and every Circuit of jurors who fail to observe the Court's instructions not to read, listen or in any way be subject to the influence of prejudicial publicity during the trial. Where publicity, as in this case, is inherently prejudicial, and evidence such as that presented by the Petitioners that jurors may well have been exposed to it, the Federal supervisory requirements that District Courts avoid even "the probability of prejudice" requires an in-depth, individual voir dire of the jurors to determine their exposure to the publicity.

Petitioners allege that only an individual voir dire of the jurors out of each other's presence can adequately preserve an accused's right to a fair and impartial jury. As stated by these Petitioners in the Trial Court below, this jury had failed to respond truthfully during pre-trial voir dire when inquired as a group concerning their exposure to prejudicial pre-trial publicity.

See, Appellants' Brief, pp. 27-28; R. Vol. 16, p. 9, App. B.

During the trial, Petitioners requested questioning of the jury regarding the prejudicial publicity. Despite counsel's request for individual voir dire, the jurors, as a group, were first reminded of the instructions given to them by the Court on the preceding Friday to avoid reading, listening or hearing anything about this trial. (R.Vol. 16, p. 15.) The Trial Court then asked the jurors collectively whether they had read anything about the trial, or seen any headlines about it. (R. Vol. 16, pp. 15-16.) The Court's initial admonition put the jurors on notice that if they stated that they had read anything, they had also violated the Court's instructions. Not surprisingly, then, no juror stated that he had read the article or headline. The Court obviously viewed the failure of any juror to affirmatively state that he had been subjected to the article a negative response. Nonetheless, other Courts have found that:

> "The fact that they [jurors] did not respond to the Court's general inquiries did not establish that the publicity 'could not have prejudiced any member of the jury'." Henslee v. United States, 246 F.2d at 193 (5th Cir. 1957), cited in Silverthorne v. United States, 400 F.2d 627, 640 (1968).

Many jurisdictions recognize that prejudicial during-trial publicity can be far more harmful to the rights of fair trial of a criminal defendant than is prejudicial pre-trial publicity. See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966); Marshall v. United States, 360 U.S. 310 (1959); United States v. Chapin, 515 F.2d at 1287, n.12. Thus, where the harm to the criminal Defendant exists from the potentiality of prejudicial mid-trial publicity, stringent standards must be set by this Court, either through the exercise of its supervisory powers or in determining the minimum standards required under due process, to insure that jurors have not been exposed to this type of publicity.

Some Circuits, such as the Fifth Circuit in deciding this case, have held that a general

questioning of the jury is sufficient to meet due process requirements. See, United States v. Capo, 595 F.2d 1086 (5th Cir. 1979). However, even within the Fifth Circuit, the procedural requirements have not been uniform. For example, the Fifth Circuit recently reversed the conviction in United States v. Herring, 568 F.2d 1099 (5th Cir. 1978) because the Trial Court had failed to individually and out of the presence of each other voir dire the jury.

In United States v. Akin, 562 F.2d 459 (7th Cir. 1977), the Seventh Circuit suggested that the Circuits are divided as to the procedure to be followed when possible prejudice from publicity arises during the course of a trial. United States v. Akin, at 468. As that Court held:

> "Our Circuit has consistently required the following procedure as set forth in Margolis v. United States, 407 F.2d 727, 735 (7th Cir. 1969), cert. den'd. 396 U.S. 833, 90 S.Ct. 69:
>
> > 'Thus, the procedure required by this Circuit where prejudicial publicity is brought to the Court's attention during the trial is that the Court must ascer-

> tain if any jurors who had been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of other jurors to determine the effect of the publicity. However, if no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, the Judge is not required to proceed further.'"

The Seventh Circuit Court suggests that the same approach has been adopted by the First Circuit in United States v. Perrotta, 553 F.2d 247 (1st Cir. 1977), and by the Fourth Circuit in United States v. Hankish, 502 F.2d 71 (4th Cir. 1974). Other Courts have concluded that each juror should be questioned separately out of the presence of the other jurors. United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971); United States v. Schrimsher, 493 F.2d 848 (5th Cir. 1974); Mares v. United States, 383 F.2d 805 (10th Cir. 1967),

cert. denied, 394 U.S. 963 (1969); Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959), cert. denied, 368 U.S. 855 (1961).

This approach has found additional support and recognition by the American Bar Association in its Standards, Fair Trial and Free Press §3.5(f), which provides:

> "(f) Questioning jurors about exposure to potentially prejudicial material in the course of a trial; standard for excusing a juror.
>
> "If it is determined that the material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the Court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The examination shall take place in the presence of counsel, and an accurate record of examination shall be kept."

Although some Circuit Courts have concluded that this standard is too restrictive (see, United States v. Hankish, 502 F.2d at 77), it has been adopted by other Circuits.

See, e.g., United States v. Herring 568 F.2d 1099 (5th Cir. 1978); cf., United States v. Capo, supra.

A leading case concerning prejudicial mid-trial publicity is Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968). In that case, an extremely prejudicial article was published during the trial. The Trial Judge, in referring to the article and the possible exposure of the jurors to its contents, summarized the attitude of numerous District Court Judges:

> "Well, how are you ever going to prevent those things, in any event, I don't justify them at all. I think it is outrageous, but in a sense, it is outrageous even if there was no trial...how would you ever, in any jury, avoid that kind of thing [prejudicial mid-trial publicity]?"

The Ninth Circuit held that the Judge should have questioned the jury, in camera, as requested by defense counsel. Moreover, the Court found that the "probability of prejudice" arose and was not eliminated by the Trial Court. Citing, Sheppard v. Maxwell, 384 U.S. at 357 (1966), and Estes v. Texas, 381 U.S. 532 (1965).

A Trial Judge should not be allowed to evade his responsibility and obligation to insure that every criminal Defendant receives a fair trial because of the perceived or presumed inevitability of prejudicial publicity. As the Ninth Circuit stated in Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968):

> "Despite the inability of the trial Judge to prevent newspapers or other news media from being brought to the attention of a non-sequestered jury alleging evidence of misconduct of the Defendant not offered against him at the trial, the Trial Court cannot assume that all is well, or that there is nothing he can do. He is required to assume, until he has established otherwise by voir dire examination, 'that some of this material reached the members of the jury.' Sheppard v. Maxwell, supra, 384 U.S. at 357, 86 S.Ct. at 1519, citing Commonwealth v. Crehan, 345 Mass. 609, 188 N.E.2d 923 (1963)." Id. at 644.

The decision of the Fifth Circuit requiring that Petitioners show more than: (1) the inherently prejudicial nature of a prominently displayed news article; (2) the availability of those materials to the jury; and (3) the un-

reliability of juror responses when voir dired as a group, has created a burden of proof on a criminal Defendant that is both procedurally wrong and virtually impossible to meet. The requirement that Petitioners prove actual jury prejudice by mid-trial publicity contradicts the holding of the United States Supreme Court in Sheppard v. Maxwell, 384 U.S. 333 (1966). The holding in that case emphasizes that the Courts must assure and protect Defendants from jurors exposed to prejudicial during-trial publicity. See contra, United States v. Agueci, 310 F.2d 817 (2nd Cir. 1962).

Because of the substantial threat of prejudice to a criminal Defendant, this Court should direct the District Courts as to what procedure they must follow once Defendants have shown that substantially prejudicial mid-trial publicity has been published, and that an unsequestered jury may have been exposed to it. See, Appendix E, F. The Circuit Courts have not agreed on a standard, nor is there consistency within the Fifth Circuit as to the standard which must be followed by a Trial

Court. The Supreme Court, either under its supervisory powers or under due process analysis, should, therefore, establish standards governing the procedure for the Trial Courts to follow when faced with the dilemma of prejudicial mid-trial publicity.

III. The decision of the Court of Appeals for the Fifth Circuit holding that comments on Petitioners' post-arrest silence were not violatative of their right to remain silent when read in the context of the argument in its entirety conflicts with case precedent of this Court and other Circuit Courts.

In Petitioners' Brief to the Fifth Circuit, it was argued that the prosecutor's closing argument contained prohibited and prejudicial comments on the failure of some of the Defendants to testify. See, LUKEFAHRS' Brief, pp. 42-45. The Court, in rejecting this contention, opined that the objectionable argument did not refer to the Petitioners' "silence at trial, nor that the jury construed the remarks to have this meaning." (emphasis supplied by the Court's

italics). United States v. Capo, 595 F.2d 1086 at 1095 (5th Cir. 1979). The Court further stated that the prosecutor's comments were intended to be a reference to the refusal of the Petitioners to cooperate with law enforcement officials rather than a comment on their failure to testify:

> "A reading of the closing argument in its entirety, however, reveals that the statement was merely part of the prosecutor's rebuttal argument that the defendants had the opportunity to cooperate with law enforcement officials after their arrest, but declined to do so." (emphasis supplied) United States v. Capo, Id. at 1094.

This interpretation of the facts differed not only with the Petitioners', but also with that of the Government. The Government argued in its Brief that the comments were made to show that none of the Petitioners declined to participate in the crime "...during the period in which they were supposedly being entrapped...." (Government's Brief, p. 32.) These Petitioners never alleged an entrapment defense. See, e.g., S.R.Vol. 3, p. 14.

Thus, there have been three different interpretations of the prosecutor's argument: The Petitioners', the Government's, and the Fifth Circuit's.

Both the Petitioners and the Court of Appeals concur that the remark of the prosecutor, which was coupled with a gesture toward the Defendants-Petitioners, referred to their failure to take the stand or facilitate law enforcement. As the Court stated:

> "Viewed in its naked form apart from the remainder of the closing argument, the prosecutor's statement, when combined with his gesture, appears perhaps to be a remark on defendants' failure to take the stand." United States v. Capo, 595 F.2d at 1094.

While rejecting the Petitioners' contention, the Fifth Circuit demonstrated that the argument of the prosecutor was improper and constitutes reversible error, in a manner not contemplated by the Petitioners or the Government. Under either theory, this Court should find reversible error.

If the comments were, as the Fifth Circuit Court has ruled, a reference to the failure of the Petitioners to cooperate with the law enforcement officials after their arrest, then the judgment and sentence should be reversed. A comment on the failure of the accused to cooperate following his arrest is tantamount to a comment on this post-arrest silence, which is forbidden. Doyle v. Ohio, 426 U.S. 610 (1976).

In Doyle v. Ohio, 426 U.S. 610 (1976), a State prosecutor used the Defendant's pretrial silence to impeach his trial testimony, the Government's contention being that if the Defendant's trial testimony were true, he surely would have explained his innocence to the police at the time of his arrest. The Supreme Court ruled that the Defendant's silence could not be used for impeachment purposes. This ruling in Doyle was an expansion of the Court's previous holdings that the post-arrest silence of the accused could neither be commented upon by the prosecutor, nor the subject of a presumptive instruction by the Court. See,

Griffin v. California, 380 U.S. 609 (1965), rehearing denied, 381 U.S. 957 (1965); United States v. Hale, 422 U.S. 171 (1975).

The decision of the Fifth Circuit that the prosecutor's statement was a comment on the post-arrest silence of the Petitioners raises an issue of Constitutional importance. The Petitioners continue to argue that where the remark is susceptible to interpretation by the jury as a comment on Petitioners' failure to testify, it must be reversible error. Griffin v. California, 380 U.S. 609 (1965); Wilson v. United States, 149 U.S. 60 (1893); United States v. White, 444 F.2d 1274 (5th Cir. 1971), cert. denied, 344 U.S. 949 (1971).

Therefore, the Fifth Circuit holding that the prosecutor's comment does not infringe on the Petitioners' Fifth Amendment rights is error. Whether read in light of the entire closing argument or as a separate unit, a remark concerning Petitioners' failure to testify at trial, or one that suggests their refusal to help law enforcement officers, is a violation of Petitioners' rights to remain silent. The Fifth

Circuit analysis provides dangerous precedent and creates an erosion of Fifth Amendment rights.

CONCLUSION

Petitioners pray that the Petition for Writ of Certiorari be granted to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

LAW OFFICES OF EDWIN MARGER

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APPENDIX A

The following is the list of prospective jurors in this case with excerpts from and citations to their remarks during voir dire concerning their knowledge of publicity surrounding this case and/or the State murder case involving these Defendants:

PROSPECTIVE JURORS

Sapp: Knew a little, S.R. Vol. 3, p. 137

Three people died because of it, S.R. Vol. 3, p. 137

Tallahassee Democrat (heard opinions), S.R. Vol. 3, p. 139

Revel: Read in Democrat - Sandy Creek S.R. Vol. 3, p. 163

Sinkhole lead to murders, S.R. Vol. 3, p. 163

Suggested voir dire, truck lifted out of sinkhole, S.R. Vol. 3, p. 163

Kling: Read concerning sinkhole murders and pot smuggling in Democrat - sinkhole trigger? S.R. Vol. 3, p. 173

Jackson: Sinkhole, them recovering bodies, S.R. Vol. 3, p. 216

Judge asked for connection; response is no, S.R. Vol. 3, 217

Thurmond: Sandy Creek - murders, S.R. Vol. 4, p. 17

Mack: Read newspaper accounts, S.R. Vol. 4, p. 27

Deaths in Sandy Creek, S.R. Vol. 4, p. 30

Points out influence of Judge's wording, S.R. Vol. 4, p. 40

Cato: Know...just that it happened, S.R. Vol. 4, p. 43

Trigger connection between charge and read? Yes. S.R. Vol. 4, p. 47

Some bodies were found - sinkhole, S.R. Vol. 4, p. 49

Knows they're from Panama City, S.R. Vol. 4, p. 64

Men and women, S.R. Vol. 4, p. 65

Barrow: Just said it was going to be the sinkhole, that's the murder one, isn't it? S.R. Vol. 4, p. 74

Contact with area law enforcement, S.R. Vol. 4, p. 82

Feels crime has been committed, S.R. Vol. 4, p. 86

Young: When you read the charge,

associated it with something I had read, I guess, really, I probably did, I think we all read something, S.R. Vol. 4, p. 95

Sandy Creek, S.R. Vol. 4, p. 97

Says he thoroughly reads paper, S.R. Vol. 4, p. 102

There must have been a crime somewhere committed, S.R. Vol. 4, p. 102

Bass: Mention of Bobby Vines reminded of press, S.R. Vol. 4, p. 112

Drug charges related to murders, S.R. Vol. 4, p. 112

Crime has been committed, S.R. Vol. 4, p. 115

But on crime, see S.R. Vol. 4, pp. 117, 130

Any testimony must carry far greater weight, S.R. Vol. 4, p. 132

Bradwell: Possibly read about it, S.R. Vol. 4, p. 141

Vines, S.R. Vol. 4, p. 142

Sandy Creek - murder, S.R. Vol. 4, p. 144

Associates murders and charges, S.R. Vol. 4, p. 145

Holifield: Had read a little about it in paper, S.R. Vol. 4, p. 170

Sinkhole murder case, S.R. Vol. 4, p. 172, 177

Something on T.V., S.R. Vol. 4, p. 173

Crowley: Juror next to me said there have been newspaper accounts, S.R. Vol. 4, p. 194

Sinkholes - smuggling and murder, S.R. Vol. 4, p. 198

Speculate it might be same case, S.R. Vol. 4, p. 198

"Assuming" sinkhole/murders are this case, S.R. Vol. 4, p. 217

Rivers: Assume it is the same case - sink deal, bodies were - Bobby Vines, S.R. Vol. 4, p. 225

One dead was 14 - close to age of daughter, S.R. Vol. 4, p. 229

I'm sure the crime has been committed, S.R. Vol. 4, p. 242

Some evidence or no indictment, S.R. Vol. 4, p. 242

Kasten: Sinkhole incident, truck being pulled out, S.R. Vol. 4, p. 264

Relates to the Perry Murders, S.R. Vol. 4, p. 267

Subscribes to Tallahassee Democrat, S.R. Vol. 4, p. 273

Sees Perry murders every time Channel 6 goes on, S.R. Vol. 4, p. 274

Sandy Creek - in connection with murder, sinkhole bust, S.R. Vol. 4, p. 288

Walborsky: Do names Sandy Creek/sinkholes invoke any response? I think of murder. R. Vol. 7, p. 51

Would trigger response again, R. Vol. 7, p. 52

Conjectured the connection between sinkhole and this case and bases this on newspaper, R. Vol. 7, p. 77

It might affect his judgment, R. Vol. 7, p. 78

Hodges: You mentioned marijuana, I don't know if murder is connected R. Vol. 7, p. 100

Sinkhole, R. Vol. 7, p. 101

Sandy Creek means pot smuggling - the girls, R. Vol. 7, p. 101

Unless I just believe everything like, in the papers, R. Vol. 7, p. 112

Wilson: Accounts in newspaper of sinkhole incident (no prior mention of sinkhole by Judge) R. Vol. 7, p. 134

Mostly heard about murder aspect of it, R. Vol. 7, p. 134

Sandy Creek would elicit response, R. Vol. 7, p. 147, 148

Question - would that information make you unfair or partial? R. Vol. 7, p. 150

Kinch: Murders at sinkhole, R. Vol. 7, p. 180

Golden: Water hole - something like some bodies found in it or something, R. Vol. 8, p. 34

Taylor: I had read about case in papers, well I read about finding the bodies down there, R. Vol. 8, p. 74

Sandy Creek - some smuggling operation, R. Vol. 8, p. 79

Water hole, ship's hold, etc., R. Vol. 8, p. 81

Bodies found there, 2 men, 2 women, R. Vol. 8, p. 81

Christie: Did you know about case? Not at first. R. Vol. 8, p. 95

Read about when they found the people and got truck, R. Vol. 8, p. 109

Specific facts, R. Vol. 8, p. 109

Myers: No knowledge, R. Vol. 8, p. 126

Worries a lot about her drug biases, R. Vol. 8, p. 123-125

McNeil: Bias versus pot, R. Vol. 8, p. 167

Lucas: Subscribes to Tallahassee Democrat, R. Vol. 8, p. 157

Didn't hear of case, R. Vol. 8, p. 157

Alagood: Sinkhole - bodies out of there, R. Vol. 8, p. 180

Relates sinkhole and Sandy Creek, R. Vol. 8, p. 181

Caused from drug operation, R. Vol. 8, p. 181

Casisseaux: Sinkhole down in Sandy Creek, R. Vol. 8, p. 218

Only related it to truck, R. Vol. 8, p. 220

West: Names - I connected that immediately, then, with the publicity, R. Vol. 8, p. 229

Bodies started showing up in sinkhole, R. Vol. 8, p. 230

Cultural bias, I'm afraid, R. Vol. 8, p. 231

Brim: Followed "story" regularly, R. Vol. 8, p. 244

Thinks crime was committed, R. Vol. 8, p. 251

Knew "Billy's" father very well, R. Vol. 8, p. 251

Miller: Guessed case, from paper, R. Vol. 9, p. 4, 5

Sinkhole/four bodies, R. Vol. 9, p. 6

This part tried here, the other part in Pensacola, R. Vol. 9, p. 6

Two men/two women, one young - on murders, R. Vol. 9, p. 16

Connection from paper, R. Vol. 9, p. 18

Johnson: Had idea of case - from paper, R. Vol. 9, p. 37

I've heard about case in newspaper, R. Vol. 9, p. 38

Sandy Creek/sinkhole - rings a bell, yes - marijuana smuggling from Sandy Creek and sinkhole murders, R. Vol. 9, p. 39

Believes crimes have been committed, R. Vol. 9, p. 54 (later changes - see argument, p. 62)

Overstreet: Drug case/tied in with those sinkhole murders, R. Vol. 9, p. 72

Longer I have been here, the more I'm convinced, R. Vol. 9, p. 73

On crime been committed - yes. I should say no. R. Vol. 9, p. 87-88

Young girls, boys, R. Vol. 9, p. 89

Parramore: Sinkhole case/murders - Questions asked by people I work with, R. Vol. 10, p. 9

Two men/two women, young and from Bay area, R. Vol. 10, p. 11

Tells story from papers, R. Vol. 10, p. 27-28

Newhall: People found in sinkhole, pot - I heard more out there waiting than ever before, R. Vol. 10, p. 37

Woods: Listened to accounts of sinkhole murders, but didn't know it was separate from the pot case R. Vol. 10, p. 78, 82

Camper truck, R. Vol. 10, p. 98-102

Woody: Know nothing about case - doesn't really read (unable to) R. Vol. 10, p. 155, 156

Johnson: You know, what's been on the news, R. Vol. 10, p. 177

Sinkhole - finding bodies - just what was in the paper, R. Vol. 10, p. 182

Girls and ages and pick-up, R. Vol. 10, p. 183

Fontana: Knew case before Court, R. Vol. 10, p. 208

Read prior articles, R. Vol. 10, p. 209

Doesn't relate sinkhole to this case, R. Vol. 10, p. 214

Hillensbeck: Knew of case from paper, R. Vol. 10, p. 254

Sandy Creek rings a bell - that's where it happened - title where people were

murdered, R. Vol. 10, p. 261

Stumbled upon the drugs, R. Vol. 10, p. 262

Truck found in water, R. Vol. 10, p. 263

Four people, R. Vol. 10, p. 272

Chason: You think case relates to paper? Yes, sinkhole murders, R. Vol. 10, p. 110

Group of pictures - Doesn't know how she made connection, just did, R. Vol. 10, p. 113

Association with Bobby Vines and something she read, R. Vol. 10, p. 116

Sandy Creek rings bell from reading newspapers, R. Vol. 10, p. 122

Two men/two women, R. Vol. 10, p. 123

Probably walked upon some dope smuggling operation - Assume people they walked upon killed them, R. Vol. 10, p. 123

Tinkler: Did you know case you'd be on? Naturally, yes. R. Vol. 10, p. 144

Read all articles in paper, R. Vol. 10, p. 147

Hillensbeck: My age, R. Vol. 10, p. 273

Just know about truck, R. Vol. 10, p. 273

Husband's been keeping up with it, R. Vol. 10, p. 274

People were killed, came upon smuggler, R. Vol. 10, p. 276

Hensen: Did recognize the incident on marijuana, R. Vol. 10, p. 298

Recognized Bobby Vines, R. Vol. 10, p. 298

Heard of Sandy Creek on TV, R. Vol. 10, p. 298

Questioned about anything else - answer: missing people, two men/two women, R. Vol. 10, p. 312-313

Isom: Talking about the sinkhole incident (no prior mention of sinkhole from Judge), R. Vol. 10, p. 328

Relates Sandy Creek with sinkhole - killed when arrived at scene, R. Vol. 10, p. 332

Description of murders, R. Vol. 10, p. 335

Neal: Relation of Sandy Creek - pot - sinkhole, R. Vol. 10, p. 361

Brought up bodies - stemmed from a marijuana deal, R. Vol. 10, p. 363

Listened to wife despite instructions, R. Vol. 10, p. 373

Elgin: Recognized Vines from papers, R. Vol. 11, p. 7

Perry case & sinkhole - bodies R. Vol. 11, p. 11

Boat sunk with marijuana in sinkhole - some connection, R. Vol. 11, p. 13

Two men/two women, R. Vol. 11, p. 11

Ferguson: Marijuana case, R. Vol. 11, p. 37

Sinkhole, R. Vol. 11, p. 40

No relationship between sinkhole and this case, but..., R. Vol. 11, p. 41

...saw request for venue change, R. Vol. 11, p. 53

Mercer: Not sure she could lay ideas aside, R. Vol. 11, p. 61

Recalls details, R. Vol. 11, p. 67-68

Relates this to this case, R. Vol. 11, p. 68

Has ideas, R. Vol. 11, p. 68

Alexander: Doesn't know anything about pre-trial publicity R. Vol. 11, p. 111

Doesn't remember anything lately, R. Vol. 11, p. 120

Bishop: Knows others talking - four killed and drugs, R. Vol. 11, p. 140

Goodson: Sandy Creek reaction, R. Vol. 11, p. 168, 169

Watts: Relates knowledge of drugs, murders, car links, R. Vol. 11, p. 189

Girls/men, R. Vol. 11, p. 189

Brown: Sandy Creek, heard about people being found R. Vol. 11, p. 210

Blanton: Bodies and pick-up out of sinkhole - heard folks talking, R. Vol. 11, p. 228

Neal: Sandy Creek - drug smuggling or something, R. Vol. 11, p. 249

Sinkhole - murders, R. Vol. 11, p. 251

Killed by group unloading ship, R. Vol. 11, p. 254

Williams: Remembers case, involved pot, R. Vol. 11, p. 269

Connection with another case trying to be connected with this case, R. Vol. 11, p. 271

Sandy Creek case - the murder case, R. Vol. 11, p. 272

Two men/two women, R. Vol. 11, p. 272

Marijuana people with murders, R. Vol. 11, p. 273

Womble: Has something to do with smuggling, R. Vol. 11, p. 292

Saw words in paper, R. Vol. 11, p. 308

Truck/young girls, R. Vol. 11, p. 309-310

But I'm not positive how my mind will work right at that moment, that I'm going to try ...R. Vol. 11, p. 313

Brown: Sinkhole - connecting drugs and sinkhole, R. Vol. 11, p. 324

Russ: Heard something on T.V., R. Vol. 11, p. 348

McAfee: Assumed it was about the Sandy Creek incident, R. Vol. 11, p. 367

Things all tied up together, R. Vol. 11, p. 372

Moulton: I've heard about it before, R. Vol. 11, p. 383

Sandy Creek relates to bodies, R. Vol. 11, p. 385

Anything involving drugs, nods negative, R. Vol. 11, p. 385

APPENDIX B

The following is the list of jurors impanelled in this case with excerpts from and citations to their remarks during voir dire concerning their knowledge of publicity surrounding this case and/or the State murder case involving these Defendants:

JURORS IMPANELLED

Thurmond: Case about marijuana bust, S.R., Vol. 4, p. 16

Sandy Creek--murder of four people, S.R., Vol. 4, p. 17

Cato: Indictment triggered connection, S.R., Vol. 4, pp. 46-47

Sinkhole in Taylor Co., some bodies were found, S.R., Vol. 4, p. 49

Knew young people, S.R., Vol. 4, p. 56

With drugs, S.R., Vol. 4, p. 56

Panama City, S.R., Vol. 4, p. 64

Some men/women, S.R., Vol 4, p. 65

Bass: The mention of Mr. Vines brought to mind recent press reports and everything, S.R., Vol. 4, p. 112

Some of drug smuggling

charges related to some murders, S.R., Vol 4, p. 113

The Sandy Creek murders, S.R., Vol 4, p. 113

Made connection through Vines name, S.R., Vol. 4, p. 113

Regularly subscribes to Tallahassee Democrat, S.R., Vol. 4, p. 114

The only evidence I have up to now, quote, is from press accounts, S.R., Vol. 4, p. 129

Bradwell: Q: Anything in indictment that you've read about

A: Possibly . . . in Tallahassee Democrat, S.R., Vol. 4, p. 141

Sandy Creek--sinkhole murder case, S.R., Vol. 4, p. 144

Q: Do you connect Sandy Creek murder with these Defendants?

A: Yes, sir., S.R., Vol. 4, p. 145

Golden: R., Vol. 8, p. 3

Something like some bodies or something was found in it. R., Vol. 8, p. 13

They found some--a girl or

something, R., Vol. 8, p. 30

Christie: R., Vol. 8, p. 92

Q: Does Sandy Creek mean anything to you, R., Vol. 8, p. 99

A: Well, I've read the papers before

Regularly gets Tallahassee Democrat, R., Vol. 8, pp. 99-100

Read when they found the people and got the truck out, white, 2 males and 2 females a couple of them were real young and a couple of them older. R., Vol. 8, p. 109

Newhall: (Remembers details of publicity, R., Vol. 10, pp. 45-46.)

People do talk, no matter what you tell them to do. R., Vol. 10, p. 46

And apparently some people out there put some things together, R., Vol. 10, p. 47

Just people recognizing either names or locales or something like that, R., Vol. 10, p. 49

Q: Sandy Creek or Sinkhole

you haven't told us?

A: Unidentified bodies

Somebody said, oh, this must be about the Sinkhole murders. And that phrase was used. R., Vol. 10, p. 61

Overstreet: R., Vol. 9, p. 66

Was drug ring or something like that. And it made me think that it tied in with those Sinkhole murders or that they were trying to tie it up. R., Vol. 9, p. 72. (Specific details recalled), R., Vol. 9, pp. 89-90.

Woods: R., Vol. 10, p. 74

Q: . . . or anything at all about this case?

A: Well, of course, . . . What is it?-- Sinkhole murders, but I hadn't--didn't know it was a separate charge from that case v. the marijuana case, R., Vol. 10, p. 78.

Sandy Creek murders, R., Vol. 10, p. 82

Truck pulled out of Sinkhole, R., Vol. 10, p. 98

Other details, R., Vol. 10, pp. 100-102.)

Fontana: R., Vol., 10, p. 202

Q: Before you came here, did you know what case you would be juror on?

A: Yes. Article in Sunday's newspaper, R., Vol. 10, p. 208

When you read the indictment, I realized what case it was, because I had read in the newspaper about it prior to that, R., Vol. 10, p. 210

Q: Do you, in any way, relate that (murders) to this case?

A: No. R., Vol. 10, p. 214

(Recalls details of murders, R., Vol 10, p. 218.)

Mercer: Had some idea (of what case was), R., Vol 11, p. 59

Q: Do you relate this case to something that you read in the paper?

A: I recall very vaguely . . . There was a ship boats sank somewhere that was an attempt to unload some marijuana . . . I don't recall whether or not this happened before the incident of bodies being found in the Sinkhole, R., Vol. 11 , p. 67

(Recalls details), R., Vol. 11, p. 68

And I think what I got from that was the speculation that these persons may have witnessed the unloading of the marijuana and that they, in fact, may have been killed as a result of this. R., Vol. 11, p. 68

Don't know if it had to do with guns that were used, R., Vol. 11, p. 81.

[Also remarks on R., Vol. 11, p. 88.]

Neal: R., Vol. 10, p. 351

Q: Do you think you've heard about this case at anytime?

A: Yes, . . . Sandy Creek and Sinkhole, R., Vol. 10, p. 360

They brought up some bodies or something . . . And it all stemmed from a marijuana deal. R., Vol. 10, p. 363.

My wife said paper said . . . there could be at least six more people killed . . . R., Vol. 10, p. 364

ALTERNATE JURORS

Alexander: R., Vol. 11, p. 103

No knowledge.

Bishop: R., Vol. 11, p. 133

Sandy Creek rings bell. R., Vol. 11, p. 140

Four people killed and they think drugs have to do with something connected with the case . . . R., Vol. 11, p. 140

Goodson: R., Vol. 11, p. 158

Q: Sandy Creek, R., Vol. 11, p. 168

A: Some people were found down there. Some bodies was found. R., Vol. 11, p. 169

Blanton: R., Vol. 11, p. 220

Sinkhole--They got four bodies out of, R., Vol. 11, pp. 227-228.

APPENDIX C

The following are excerpts from articles which appeared in the Tallahassee Democrat since August 8, 1977, in which links are made between Sandy Creek pot smuggling operation and the Sinkhole Murders.

1. December 20, 1977
   ¶3 ". . . pot-smuggling led to murder . . ."

2. December 10, 1977
   ¶3 ". . . Sandy Creek pot-smuggling . . . led to slayings of four . . ."

3. December 9, 1977
   ¶1 ". . . marijuana operation . . . four killings . . ."

4. December 8, 1977
   ¶1 ". . . sinkhole murders . . . pot-smuggling operation . . ."

5. December 2, 1977
   ¶2 ". . . sinkhole murders and related pot operation . . ."

6. December 1, 1977
   ¶¶14 and 5 "pot-smuggling . . . four . . . shot to death . . ."

7. November 30, 1977
   ¶1 ". . . pot-smuggling . . . Taylor County sinkhole murders . . ."

8. November 30, 1977
   ¶2 ". . . killing . . . pot-smuggling . . . Sandy Creek . . ."

9. November 16, 1977
   ¶3 ". . . pot-smuggling related murders . . ."

10. November 15, 1977
    ¶3 ". . . Sandy Creek . . . the night the victims were slain . . ."

11. November 10, 1977
¶8 ". . . four killings linked to . . . Sandy Creek Smuggler . . ."

12. November 8, 1977
". . . the boat lawmen believe was used in a pot smuggling operation in which four persons were murdered . . ."

13. November 6, 1977
". . . radio stations carrying a North Florida pot and murder story into the flat rows of wood-framed houses . . ."

14. November 6, 1977
". . . financier of a pot smuggling operation that resulted in four murders . . ."

15. November 5, 1977
". . . authorities theorize that four Panama City area people whose bodies were found in a sinkhole near

Perry this summer were murdered when they stumbled onto the marijuana unloading operation. . ."

16. November 1, 1977
". . . arrested two weeks ago for marijuana conspiracy and third degree murder in the deaths of four Panama City people whose bodies were found in Watering Hole Sink near Perry this summer . . ."

17. November 9, 1977
¶3 ". . .killing of four who stumbled. . .onto pot-smuggling operation near Panama City . . ."

18. November 9, 1977
¶4 ". . .marijuana. . .Sandy Creek . . . four killings . . ."

19. October 30, 1977
¶9 ". . .sometime after midnight . . .they stumbled on a pot-smuggling operation and were killed because

they recognized some of the men involved. . ."

20. October 29, 1977
¶1 ". . .six of the men charged with smuggling 20 tons of pot into Sandy Creek plead innocent to. . . murders. . ."

21. October 24, 1977
". . .helping local authorities with the Taylor County sinkhole murder case. . .shrimpboat. . .carried load of pot. . .the night sinkhole victims disappeared. . ."

22. October 19, 1977
¶1 "Eight men were charged today with four. . .murders. . .lawmen linked the killings to a pot-smuggling operation that went awry near Panama City. . ."

23. October 14, 1977
¶1 ". . .Seven. . .arrested in the

Sandy Creek drug importation. . . possible link with the sinkhole murders. . ."

24. October 10, 1977
¶1 ". . .may help unravel the sinkhole murders. . .who bought the 14 foot boats used in a marijuana operation the night the four sinkhole victims disappeared. . ."

25. September 7, 1977
¶2 "Bobby Vines. . .about a marijuana deal near Panama City. . . Police believe he can provide information about murders. . ."

26. September 3, 1977
¶17 "Agents are continuing to trace. . .four. . .to link them with a marijuana smuggling operation that went awry in Sandy Creek. . ."

27. August 21, 1977
¶13 ". . .an apparent link between

the victims and a huge marijuana deal near Springfield. . ."

28. August 18, 1977
¶1 ". . .drug-smuggling. . .four . . .residents murdered. . ."

29. August 14, 1977
¶4 ". . .killings. . . connected . . .drug-smuggling. . ."

30. August 13, 1977
¶1 ". . .same night. . .Watering Hole Sink. . .pot-smuggling operation."

31. August 11, 1977
¶14 ". . .the four sometimes visited Sandy Creek. . .a marijuana deal. . .Sandy Creek about the time the four disappeared. . ."

32. January 31, 1978
Page 1b "Sandy Creek operation. . . where they were bound, shot and dumped . . .in sinkhole. . ."

33. January 29, 1978
Page 1c "Sandy Creek smuggling trial Monday" ". . .pot smuggling ring that led to four murders. . ."

34. January 28, 1978
Page 1b "During the operation four residents. . .were shot. . .and dumped in the Sinkhole. . ."

35. January 24, 1978
Page 2b "The four stumbled on Sandy Creek marijuana smuggling operations by accident and were killed. . ."

36. January 31, 1978
Page 1b ". . .recovered from another nearby sinkhole pick-up truck they believe was used to transport victims from site of aborted marijuana smuggling operation at Sandy Creek. . .15 men included 7 murder defendants go on trial in Tallahassee Monday on federal marijuana smuggling charges. . ."

37. January 20, 1978

"Truck found in Taylor Sinkhole"

". . .were killed when they apparently stumbled onto a marijuana unloading operation at Sandy Creek . . .15 men including seven of murder suspects go on trial in Tallahassee January 30 on marijuana smuggling charges. . ."

APPENDIX D

The following are excerpts from newspaper articles published between October 15, 1977 and December 20, 1977 which described alleged criminal activities or convictions of the Defendants.

1. December 20, 1977 (News-Herald)

   ¶20 ". . . is serving time for smuggling in a Louisiana prison."

2. November 16, 1977 (Tallahassee Democrat)

   ¶5 ". . . must face similar charges in Louisiana. . . is currently serving a jail sentence for smuggling 18 tons of marijuana last February."

3. November 9, 1977 (Tallahassee Democrat)

   ¶31 ". . . is still in the Livingston Parrish jail serving time for his part in the smuggling of

18 tons of. . .marijuana into Louisiana last February. . . released on bonds $60,000 each must also face charges stemming from the Louisiana operation . . ."

4. October 20, 1977 (News-Herald)

¶7 ". . . is currently serving a 10-year marijuana smuggling sentence. . ."

5. October 15, 1977 (St. Petersburg Times)

¶5 ". . . is serving a 10-year sentence on drug smuggling charges involving 18 tons of marijuana."

6. October 15, 1977 (News-Herald)

¶8 ". . . where he was serving a 10-year sentence for a similar conviction on drug smuggling charges involving 18 tons of pot."

NEWS-HERALD

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October 20, 1977

"Get away from the crowd when you can. Keep yourself in yourself, if only for a few hours daily."
Arthur Brisbane

14 Charged In Deaths Of Four At Sinkhole

State Attorney Lee Jones announced Wednesday that he has charged 14 persons, including two local men, with murder in the gangland-style slaying of four Springfield residents last January.

Bonds totalling $3.2 million have been set.

The 14, including six still at large, were charged with third-degree murder. Officials said the case would be brought before a grand jury in two weeks.

George Sims, 39, was gunned down when he and three companions wandered onto the 60-ton marijuana smuggling operation under way at Sandy Creek. Sandy Creek empties into the confluence of East Bay and the intercoastal waterway about 12 miles south of Panama City, in a particularly remote area marked with pine woodlands and sawgrass flats.

Sheila McAdams, 16, her younger sister, Sandy, 14, and Glenn Hood, 31, were killed because they witnessed Sims' death, Jones explained.

Investigators feel that Sims was killed during "a confrontation" with one of the guards posted by the smugglers.

Charged with murder are Christopher Dale Goodwin, 28, and Steven Buford Long, 29, both of Panama City; William Hunt Epperson Jr., 28, and Bobby Joe Vines, 40, both of Tallahassee; Walter Gale Steinhorst, 47, Live Oak; Lloyd Anderson Woods, 28, Orlando; David Monroe Goodwin, 31, Merritt Island, and James Davison, 31, who is currently serving a 10-year marijuana smuggling sentence at the Livingston, La., parish jail.

At least seven of those now in custody were charged last week with possession and

Cont'd.

smuggling of marijuana.

The four murder victims disappeared the same night that 3,000 pounds of marijuana turned up floating in Sandy Creek.

"The victims were just at the wrong place at the wrong time," said Eddie Boone, special agent for the FDCLE in Tallahassee. He said first degree murder charges are expected to be filed against some of the men after the grand jury convenes.

The four had left a bar in Springfield and driven to nearby Sandy Creek, where they found three groups unloading 18 to 20 tons of marijuana, according to Boone.

Sims knew one of the smugglers, Boone said, and was shot at the scene.

The other three were tied up and taken to the sinkhole where they were each shot," Boone said. Sims had been shot in the chest while the other three were tied, gagged and shot in the back of the head.

It is now known, according to Jones, that the illegal weed came to land in john boats from a larger 70-foot steel framed shrimp trawler called the Gunsmoke.

The Gunsmoke was later found abandoned, adrift and sinking near St. Petersburg, and authorities indicated they will attempt to raise the scuttled boat.

"There is no telling what will be found if that ship is raised," one investigator close to the case, said. "There may be another dead body."

Boone said that one break in the case came when it was discovered that two of the suspected smugglers live near the sinkhole where the bodies were found. He refused to say which two.

Authorities released the names of eight of the men charged and already in custody, but refused to disclose the other six until they also have been arrested. Boone said all those being sought had fled the state and it was feared some might be out of the country.

Even before the victims were murdered, officials said, the smugglers were beset with troubles. One of the band, who claimed to know local waters, rammed the Gunsmoke into a sandbar while attempting to pilot the boat into Sandy Creek from East Bay.

FDCLE officials said it was no mystery that the four victims were well acquainted and dated each other, and that Sandy Creek was a favorite hangout of the four.

NEWS-HERALD

October 15, 1977

Drug Busts Announced

Sinkhole Murder Link Sought

Seven men including two from Panama City, have been arrested on marijuana smuggling charges that may be linked to the sinkhole slayings of two ex-convicts and two sisters from Springfield.

The seven were arrested on charges of conspiracy and possession of marijuana with intent to distribute in connection with 3,000 pounds of pot found floating in Sandy Creek Jan. 24, west of Panama City.

Arrested at various locations by a task force of state and federal agents were: Christopher Dale Gandwin, 28, and Steven Buford Long, 30, both of Panama City; Lloyd Andrew Woods, 28, Orlando; William Hunt Epperson Jr., 36, and Thomas James Davison, 38, both of Jacksonville; David Monroe Goodwin, 30, Merritt Island, and Walter Gales Steinhorst, 47, Live Oak. Goodwin and Buford are lodged in the Bay County Jail.

The four sinkhole victims are thought to have either known about the Sandy Creek operation or stumbled upon it.

George E. Sims, 30, 250 Helen Ave., Douglas Glen Hood, 21, 2801 E. 9th Plaza, and two sisters, Sheila McAdams, then 16, and her younger sister, Sandy, 14 were found in a murky sinkhole 135 miles east of here. The bodies had been shot and weighted with cement blocks.

Authorities have declined to comment on whether murder charges will be filed but the Florida Department of Criminal Law Enforcement is planning a news conference to give additional information on the case next week.

Locally, announcement of the arrests was made by the office of State Attorney Lee Jones whose investigators participated with the Florida Marine Patrol, United States Drug Enforcement Administration and the FDCLE. The arrests were made on federal warrants Thursday afternoon.

Total bonds for the seven arrested has been set at $760,000. One of the suspects, Davison, was arrested in the Livingston Parish Jail, Livingston, La., where he was serving a 10-year sentence for a similar conviction on drug smuggling charges involving 18 tons of pot.

The 3,000 pounds of marijuana found by the Florida Marine Patrol in January at Sandy Creek, was believed at the time to be part of a larger shipment that apparently went sour, involving up to 40 tons of the weed.

The investigation became a joint case when the Marine Patrol requested and received the assistance of the FDCLE and U.S. drug enforcement agency. The state attorney's office was then brought into the investigation. As state and federal agencies entered the case, it quickly spread nationwide and into several foreign countries.

Hundreds of man hours have, to date, been spent on the case, according to Jones, who added, his office and assistant United States Attorney Dan Medenitz coordinated the numerous legal details required for prosecution and provided legal advice to the law enforcement agencies involved.

Jones said investigators from his office, along with Eddie Boone, special agent in charge of the Tallahassee FDCLE Operations Center; Bob Ginley, special agent in charge of the North Florida District for the Drug Enforcement Administration, and Major Lowell Pitts of the Department of Natural Resources, coordinated the nine-month investigation.

United States Attorney Nick Geeker said the investigation is continuing and other arrests are anticipated after additional findings are presented to a federal grand jury in the near future.

APPENDIX E

Marked at trial Peter Van Estrup's Exhibit No. 1.

Tallahassee Democrat
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Convicts lived it up here — while they could

By SETH EFFRON
Democrat staff writer

Two Louisiana convicts, in Tallahassee for trial on federal marijuana smuggling charges, did not spend Friday night in the comfort to which they had become accustomed since arriving here 17 days ago.

The pair had been staying — with their wives — at the Hilton Hotel, the Killearn Inn at Killearn Country Club and a Ramada Inn, during the time they were absent from their Livingston Parish, La., jail cells.

Friday night, the two enjoyed the hospitality of Sheriff Ken Katsaris and the staff at the Leon County jail.

And that's where they'll stay until a special order from the Livingston Parish sheriff is received saying that Thomas and Steven Lukefahr can be returned to the control of a parish deputy who's also here for the trial.

According to the Lukefahrs' attorney, Edwin Marger of Atlanta, the two spent one day at the Hilton, 10 days at the Killearn Inn and the past week at the Ramada Inn East. Staying with them was the Louisiana deputy, W.L. Kinchen.

The Lukefahrs, Marger said, have been footing the bill, including Kinchen's share.

Thomas Lukefahr, 32, of Jacksonville, is serving a 10-year sentence (that he is appealing) for distribution of marijuana in Livingston Parish. Steven, 30, of St. Petersburg, is serving

Witness recounts threats on life, p. 1B

a one-year sentence for possession of marijuana, according to Deputy Wayne Sumner of the Livingston Parish Sheriff's office.

The two are among nine defendants in the federal marijuana smuggling trial that began this week in Tallahassee. The men are charged with conspiring to import nearly 20,000 pounds of marijuana in a boat that landed near Sandy Creek in Bay County in January, 1977.

Steven Lukefahr has also been convicted on a federal charge of possession of marijuana, for which he was ordered to pay a $5,000 fine and serve one year in jail.

At a hearing late Friday afternoon, after the pot smuggling trial recessed, Deputy U.S. Marshal Bill Joyce of Tallahassee revealed that the Lukefahrs were supposed to be in the custody of federal marshals — not the Louisiana deputy. Joyce blamed confusion over the order bringing the two to Tallahassee to stand trial.

Joyce said the Lukefahrs were his office's responsibility. He asked U.S. District Court Judge William Stafford to grant him custody of the two men.

After the hearing, which lasted about 20 minutes, Stafford ordered a $10,000 bond for Tom Lukefahr and said the two were to stay in the custody of federal marshals until a proper order was received from the Livingston Parish sheriff saying the two were on furlough and the responsibility of the Louisiana deputy.

Sumner refused to describe the policy for prison furloughs, and he referred questions to parish sheriff Odum Graves.

Joyce said Friday the two will spend their nights in the Leon County Jail until official word is received from Louisiana permitting him to turn the two over to Kinchen.

Once that order is received, Joyce said, the two will be allowed to stay wherever they want under the custody of the Livingston parish deputy. Joyce said the order was expected today or Sunday.

Tallahassee Democrat

Pot trial expected to reach jury today

By SETH EFFRON
Democrat staff writer

An attorney for three defendants in the Sandy Creek marijuana smuggling trial, which is expected to go to the jury today, failed Wednesday to have his clients acquitted because of "outrageous acts" by the government in allegedly setting up the pot deal.

Defense attorney Marvin Marger presented his motion after the prosecution had finished its rebuttal in the case being tried in U.S. District Court here.

Marger is attorney for the three Lukefahr brothers, who are charged with five other defendants with conspiracy to import marijuana.

His request was presented when routine motions for mistrial and acquittal were being heard. All of the motions for mistrial and acquittal were denied by [illegible] Wilson Stafford.

Earlier Wednesday, all 10 defendants attorneys rested their cases. Prosecution and defense attorneys then presented closing arguments and instructions for the jury's deliberations are expected to be made today.

Stafford's ruling followed a tense exchange between the judge and Marger in which Stafford called an unexplained recess while Marger was in the midst of his attack on the government.

During the five-minute surprise recess, Marger said he had never been cut off so abruptly by a judge without explanation.

Marger has claimed throughout the trial that the FBI set up the smuggling deal and that his clients and the other defendants were enticed into joining it.

"There is an escalation of government incidences of Gestapo-like tactics on unknowing people in the country to gather statistical records which have nothing to do with real [illegible]," he said.

(See TRIAL, next page)

Defendants David, Steven Lukefahr sprint Wednesday ...attorney requested acquittal because of government acts

Trial

(Continued from page 1D)

He said such events as the Sandy Creek operation in Bay County on Jan. 23, 1977, were staged by government agencies to enlarge budgets and gain more agents and more power.

Government involvement in marijuana operation, through the FBI on the part of agent Donald Baldwin and his informant Bobby Vines, Marger claimed, "is wrong, outrageous, immoral, unpatriotic and unconstitutional."

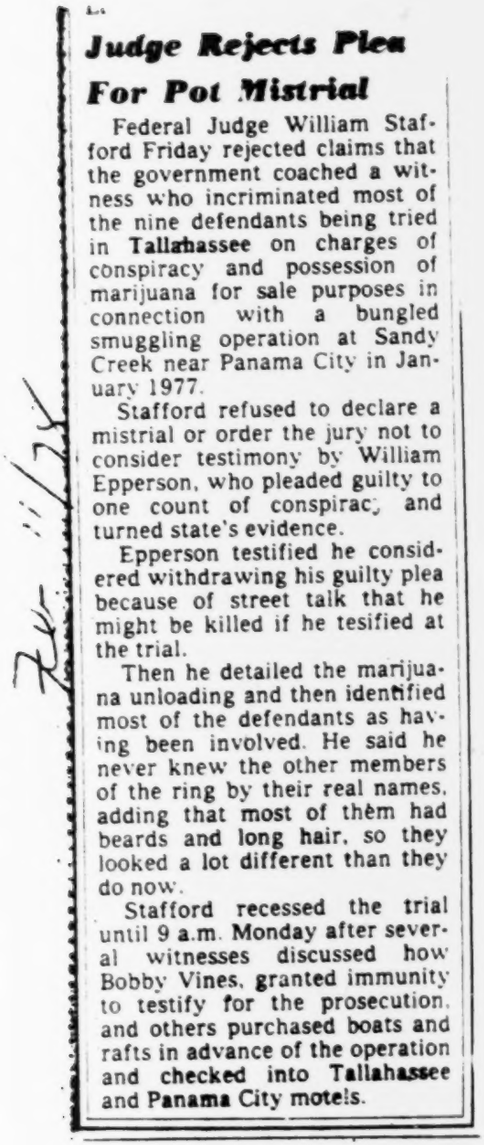
Earlier Wednesday Marger attempted to persuade Stafford to rule that prosecutor Donald Modesitt, an assistant U.S. attorney, could not question his clients about their convictions on marijuana charges in Louisiana if they took the witness stand. After the judge ruled against him, Marger rested his case without presenting any witnesses for questioning.

During rebuttal testimony, Modesitt brought Vines back as a prosecution witness. Vines earlier had testified as a witness for the defense.

Modesitt asked Vines whether he was involved in another marijuana deal in Texas when he was arrested in September 1977. Vines refused to answer the question, claiming his constitutional right against self-incrimination.

Attorney Michael Mann, defending David and Christopher Goodwin of Panama City, moved for a mistrial because Vines' Fifth Amendment claim prejudiced the case against his clients. Stafford ruled against Mann's motion.

Before the judge dismissed the jury Wednesday he asked them to come prepared to spend tonight away from home. He said as soon as he instructed the jury, they would have to stay together until a verdict in the case was reached.



Judge Rejects Plea For Pot Mistrial

Federal Judge William Stafford Friday rejected claims that the government coached a witness who incriminated most of the nine defendants being tried in Tallahassee on charges of conspiracy and possession of marijuana for sale purposes in connection with a bungled smuggling operation at Sandy Creek near Panama City in January 1977.

Stafford refused to declare a mistrial or order the jury not to consider testimony by William Epperson, who pleaded guilty to one count of conspiracy and turned state's evidence.

Epperson testified he considered withdrawing his guilty plea because of street talk that he might be killed if he tesified at the trial.

Then he detailed the marijuana unloading and then identified most of the defendants as having been involved. He said he never knew the other members of the ring by their real names, adding that most of them had beards and long hair, so they looked a lot different than they do now.

Stafford recessed the trial until 9 a.m. Monday after several witnesses discussed how Bobby Vines, granted immunity to testify for the prosecution, and others purchased boats and rafts in advance of the operation and checked into Tallahassee and Panama City motels.

APPENDIX F

I. JURORS WITH DAILY SUBSCRIPTIONS TO TALLAHASSEE DEMOCRAT

Christie	R.	Vol. 8	p. 99
Bass	S.R.	Vol. 2	p. 114
Woods	R.	Vol. 10	p. 83
Fontana	R.	Vol. 10	p. 208
Mercer	R.	Vol. 11	p. 60
Neal	R.	Vol. 10	p. 362

II. JURORS PURCHASING TALLAHASSEE DEMOCRAT ON GENERALLY REGULAR BASIS

Cato	S.R.	Vol. 2	p. 46
Bradwell	S.R.	Vol. 2	p. 141
Overstreet	R.	Vol. 9	p. 71
Newhall	R.	Vol. 10	p. 43

III. JURORS NOT SUBSCRIBING OR REGULARLY READING TALLAHASSEE DEMOCRAT

Thurmond	S.R.	Vol. 2	p. 15
Golden	R.	Vol. 8	p. 15

IV. ALTERNATE JURORS

A. Subscribing: Goodson, R.Vol. 11, p. 166

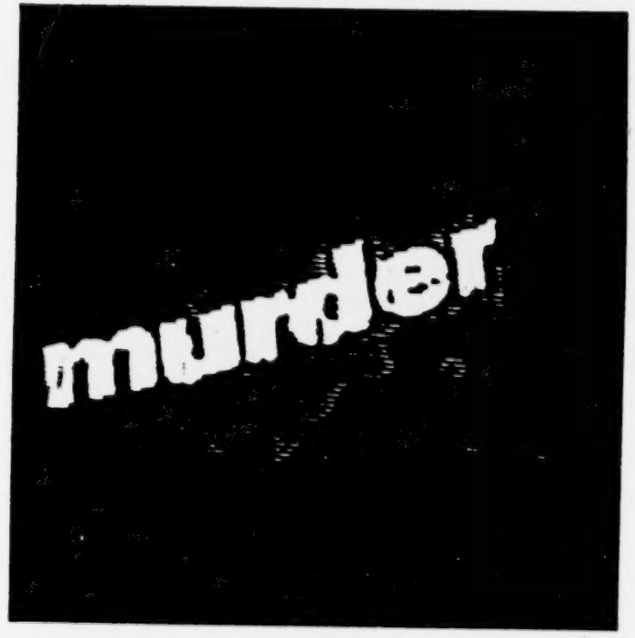
B. Regular Purchaser: Alexander, R.Vol. 11, p. 109

C. Not purchasing/subscribing:
Bishop R.Vol. 11, p. 139
Blanton R.Vol. 11, p. 226

APPENDIX G

These pictures are similar to the one admitted at trial (R.Vol. 6, p. 19). Because there was only one copy of the picture admitted into evidence, these similar ones are submitted in this Appendix form.





APPENDIX H

Dissenting opinion in United States v. Haldeman, 559 F.2d 31 (1976)

The unrefuted evidence of singularly heavier coverage in Washington, D.C. and of substantially heavier impact of the coverage in Washington (pretrial bias) could only impel a decision by the District Court Judge to move the jury selection and trial to another location in the United States, with either the same or another judge. No other area could have been as biased as Washington, D.C., and many areas could have been substantially less biased and have left no doubt about the fairness of the trial from the standpoint of venue.

This result was especially favored because of the conclusion that fairly leaps from the survey results in the Sindlinger Affidavit: much of the entire country *already thought* the appellants guilty. At the *very least* a court would be expected to remove the trial from a locale where 61% of the populace had concluded *guilt* to a locale where only 43% or less had so concluded; there must have been many such locales, since the national average was 43% (Appendix A at 6). In Richmond, Virginia, only 87½% considered that defendants were guilty. (75% of 50%, *id.*) This was not a situation where many had not heard of the case, or where many had no conclusion one way or the other. Here, on the face of an unrefuted and apparently accurate poll, most people in Washington, D.C., some 61%, in their own minds *had already completed the trial and returned a verdict of guilty*, while only some 2% of the city had formed an opinion of innocence. (*Id.* at 6). The appellants' plea was not to go where most residents had not heard of the indictments or had not formed some opinion, for their evidence disclosed no such place. The plea was to go to a place where where less than one-half the potential jurors had formed an opinion that they were *guilty*, with the rest withholding judgment.

It was possible for the Judge to travel with this case; any conviction he may have had as to the necessity that he preside need not have been violated.

IV. THE LEGAL STANDARDS

In weighing the foregoing evidence on pretrial publicity, the District Court and this court are required to apply the law that governs the change of venue question. The law on the matter is established in four categories. First, there is the law applicable to federal cases, as set by the Supreme Court and the Circuit Courts of Appeals under their supervisory power over the District Courts, and, in the case of the Supreme Court, over the Circuit Courts of Appeals as well. Second, there is the law applicable to all courts, state or federal, under the Constitution. Within each of these two categories there is a division between two types of venue-change decisions for pretrial publicity. One is the category in which prejudice to the defendant is found to exist presumptively, because of extraordinary circumstances of coverage. The second is the category in which, although prejudice cannot be declared presumptively, the *voir dire* of prospective jurors discloses sufficient prejudice to warrant changed venue. This produces the four categories of analysis: (1) federal and (2) constitutional, and (3) presumptive and (4) actual.

The case law establishing these categories is clear-cut. There is a federal supervisory standard, in addition to a constitutional standard, in these cases, which would assure fair trials by an application of the rule of presumptive prejudice or through identification of actual prejudice. This is made clear in *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), and reiterated in *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), where the Court wrote, discussing *Marshall*:

> The defendant in *Marshall* was convicted of dispensing certain drugs without a prescription. In the course of the trial seven of the jurors were exposed to various news accounts relating that Marshall had previously been convicted of forgery, that he and his wife had been arrested for other narcotics offenses, and that he

had for some time practiced medicine without a license. After interviewing the jurors, however, the trial judge denied a motion for a mistrial, relying on the jurors' assurances that they could maintain impartiality in spite of the news articles.

Noting that the jurors had been exposed to information with a high potential for prejudice, this Court reversed the conviction. *It did so, however, expressly "[i]n the exercise of [its] supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts," and not as a matter of constitutional compulsion.* *Id.*, at 313 [79 S.Ct. at 1173].

421 U.S. at 797, 95 S.Ct. at 2035 (footnote omitted) (emphasis added).

The Court in *Murphy* was addressing itself to the constitutional standard applicable to state trials. The Court went on to survey the scope of the constitutional standard, as opposed to the federal supervisory standard:

> Petitioner relies principally upon *Irvin v. Dowd*, 366 U.S. 717, [81 S.Ct. 1639, 6 L.Ed.2d 751] (1961), *Rideau v. Louisiana*, 373 U.S. 723, [83 S.Ct. 1417, 10 L.Ed.2d 663] (1963), *Estes v. Texas*, 381 U.S. 532, [85 S.Ct. 1628, 14 L.Ed.2d 543] (1965), and *Sheppard v. Maxwell*, 384 U.S. 333, [86 S.Ct. 1507, 16 L.Ed.2d 600] (1966). In each of these cases, this Court overturned a *state court conviction* obtained in a trial atmosphere that had been utterly corrupted by press coverage.
>
> In *Irvin v. Dowd* . . . the Court readily found *actual prejudice* against the petitioner to a degree that rendered a fair trial impossible.
>
> Prejudice was *presumed* in the circumstances under which the trials in *Rideau*, *Estes*, and *Sheppard* were held. . . . In *Rideau* the defendant had "confessed" under police interrogation to the murder of which he stood convicted. A 20-minute film of his confession was broadcast three times by a television station in the community where the crime and the trial took place. In reversing, the Court did not examine the *voir dire* for evidence of actual prejudice because it considered the trial under review "but a hollow formality"—the real trial had occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras.

Id. (emphasis added).

The federal supervisory standard provides broader protection against prejudice than the constitutional standard. Concurring in *Murphy*, *supra*, Mr. Chief Justice Burger wrote:

> I agree with Mr. Justice BRENNAN [dissenting] that the trial judge was woefully remiss in failing to insulate prospective jurors from the bizarre media coverage of this case and in not taking steps to prevent pretrial discussion of the case among them. *Although I would not hesitate to reverse petitioner's conviction in the exercise of our supervisory powers, were this a federal case*, I agree with the Court that the circumstances of petitioner's trial did not rise to the level of a violation of the Due Process Clause of the Fourteenth Amendment.

421 U.S. at 803–04, 95 S.Ct. at 2038 (emphasis added). And in *Rideau*, *supra*, Mr. Justice Clark wrote, dissenting:

> . . . if this case arose in a federal court, over which we exercise supervisory powers, I would vote to reverse the judgment before us.

373 U.S. at 728, 83 S.Ct. at 1420.

Recently, an opinion by Judge Bazelon emphasized that federal appellate courts have the duty to impose supervisory standards over criminal cases, *United States v. Pinkney*, 179 U.S.App.D.C. 282, 551 F.2d 1241 (1976) n.50, but, for some unexplained reason, the majority does not conform to that exhortation in this case, where the supervisory standard has been promulgated by the Supreme Court.

The foregoing makes three unequivocal points. First, there is a category of presumptive prejudice to which a federal supervisory standard applies. Second, that standard assures a defendant more protection against prejudicial pretrial publicity

than the constitutional standard. Finally, one example of the presumptive federal standard is found in *Marshall*, *supra*, under which

> . . . persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced.

Murphy v. Florida, 421 U.S. at 798, 95 S.Ct. at 2035.

V. APPLICATION OF THE STANDARDS

A. *The District Court*

The District Court disposed of the question of presumptive prejudice at the June 12, 1974, motions hearing. In doing so it did *not* distinguish between a federal and a constitutional standard, and it did *not* examine or attempt to apply the law of presumptive prejudice.

> THE COURT: Now you are talking about change of venue, where would you suggest the case be sent to for trial? Do you know of any place in the country?
>
> MR. BOYER [Mr. Spencer Boyer, for Mr. Ehrlichman]: *Any place other than the District of Columbia, Your Honor.*
>
> THE COURT: What do you mean by anyplace other than the District of Columbia? Alexandria—across the river?
>
> MR. BOYER: No, Your Honor.
>
> THE COURT: Where?
>
> MR. BOYER: What we are asking for is of course that would depend on several things. That would of course be determined by this Court. That would also depend upon the calendar of the other districts. We would be willing to assist the Court in any manner to find out any district which would be out of the immediate environs of the District of Columbia to see whether or not their calendar could accommodate a trial of this length, complexity, and scope.
>
> THE COURT: Now let's talk about some highly publicized cases that have been tried in the country. Let's go back many years, probably before your time, the trial of Richard Hauptman, involving the kidnap of the Charles Lindberg baby in New Jersey. I remember the trial very well, highly publicized. *Of course in those days we didn't have radios to the efficiency we have now, or television.* We had newspapers, frontpage story everyday all over the country.
>
> Senator Kennedy was killed out in California, a highly publicized case. The Manson trial. Recently I had two murder trials here that I presided over, highly publicized for weeks—the Ammidown case, one of the most brutal murder-rape cases ever tried in the history of our court, or probably any court in the country; and the Lee case, a companion case. *Now the test is going to be whether or not after voir dire examination by the Court you can obtain, you can empanel a jury say under oath not only having read or heard or listened to matters concerning the case that they could decide this case on the evidence and the law of the case. It comes down to that.*

Tr. June 12, 1974 (Docket No. 180) at 431–33 (emphasis added). The final sentences reveal that the District Court intended *no examination at all* to determine if the amount and nature of the presumptive prejudice violated the supervisory standard applicable in federal courts. And in fact it did not indulge in any such examination.

Later in the hearing the District Judge showed again that presumptive prejudice was not a consideration:

> We have 800,000 people approximately living in the District of Columbia. *And if we can get a jury—and this is going to be the test in my opinion*—[which] can truthfully say they have heard some parts of those hearings but have not formed an opinion from what they heard or read, or heard commentators talk about, they can truthfully say they can sit on this case even though it may be a protracted case and could render a verdict after all the evidence is in, based on the evidence and law of the case, render a verdict based solely upon the evidence and law of the case. Until we try that out how is a judge going to determine on the arguments that have been made, the Court's knowledge of prior sensational

cases that have been tried in the country, protracted cases there and here, we have had many of them right in this district, how are you going to know whether you can get a jury unless you tried first?

Now, if you try as I have indicated and you can't get them, that is one thing. If we are able to empanel an unbiased jury that is another thing. How are you going to know unless you try? I would like to hear you on that.

MR. BOYER: *Your Honor, as I indicated earlier, that several of the cases and several of the imperical [sic] studies, for example, the Broader Study on Voir Dire Examinations and Imperical [sic] Study, and in fact the ABA standards which I quoted earlier, recommend that the Court strongly protect the defendant before the trial, not to place too much emphasis on the whole concept of voir dire, especially where there has been the pervasive publicity as that as has been engendered by this particular case.*

The problem with voir dire is that it is going to be very difficult, especially here in the District of Columbia, to determine whether the juror is consciously or subconsciously harboring prejudice against the defendants because of the widespread media.

The Court earlier asked me a series of questions as to what was the distinction between some of the more celebrated cases where there was not a change of venue and this particular case. So I may submit to the Court that the circumstances Mr. Green has indicated, that this is an unprecedented case, these are as Your Honor earlier indicated, the personal friends and aides of the President, and this has been an on-going saga of more than two years whereas in many of the cases that you referred to there were but in a moment—in the Ammidown case and the Lee case, even though they were celebrated cases here in the District of Columbia—nowhere and by no stretch of the imagination—

THE COURT: —how about the case I tried which took me ten months to try? The longest case ever tried in the history of this court since 1801. It got quite a lot of publicity, incidentally. It was a civil antitrust suit against all the major railroads in the country and was publicized pretty well. It was not a murder case. We got a jury in that case and the jury sat eight months.

MR. BOYER: May I submit to the Court we are dealing with apples and oranges.

THE COURT: Wait a minute. Let me ask you a question. Do you suppose everybody that listens to radio and television commentators pro and con, everybody, or the majority of the people, have made up their mind that President Nixon is wrong in this whole matter or anyone of these defendants are all wrong and that they are guilty of things? Don't you think there are millions of people in this country now at this moment think the President has done nothing wrong and done everything according to his duties? And vice versa many other people might think otherwise. And about any of these defendants that have been highly publicized. Don't you think there are millions of people that do not believe they done anything wrong?

MR. BOYER: Your Honor, *those millions of people don't live here in the District of Columbia.*

Id. at 435–37 (emphasis added). The Sindlinger Affidavit demonstrates the truth of the last observation.

The "ABA standards" referred to in the foregoing exchange are at ABA Standards Relating to Fair Trial and Free Press 119–28 (Approved Draft) (1966). The commentary therein reviews the pre-*Murphy-Rideau* cases and succinctly states the error of the District Judge's approach in this case.

> The judicial attitude has taken the form of great deference to the discretion of the trial judge, even when there is evident dissatisfaction with his decision, *of equating the ability to impanel a jury with the absence of any need for other relief, and of insisting that the defendant establish actual prejudice on the part of virtually the entire community.*

Id. at 121–22 (emphasis added). The ABA Standards were printed in 1966. They illuminate the issues here. The pertinent standard is:

> A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. *A showing of actual prejudice shall not be required.*

Id. at 119 (emphasis added). In commentary, the ABA authors wrote:

> As shown by such cases as *People v. Martin* [19 App.Div.2d 804, 243 N.Y.S.2d 343 (1st Dep't 1963)], *Delaney v. United States* [199 F.2d 107 (1st Cir. 1952)], and *Rideau v. Louisiana* [373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963)], there are occasions when the inherently prejudicial nature of the material, coupled with knowledge of its wide dissemination in the community, requires the granting of relief without elaborate soundings of community sentiment. In such instances, change of venue may be particularly appropriate when it can be shown that the news coverage has been far less pervasive in some other locality within the jurisdiction.

Id. at 126 (footnotes omitted).

As to the opinion poll, the District Judge says simply, "You know polls can be wrong too. We remember the famous election when Governor Dewey ran against President Truman. . . . *I have great faith in the jury system.*" (Docket No. 180 at 487) (emphasis added). But this statement reflects categorical rejection without consideration of the Supreme Court rule on presumptive prejudice. In light of *Murphy* and *Marshall* the law is now that presumptive prejudice is a factor that must be examined in venue decisions. The District Court therefore committed reversible error in declining even to consider the factor. If the federal standard for presumptive prejudice exists at all, it requires the trial court to recognize the *possibility* of presumptive prejudice. Further, on the facts of this case, the presumptive prejudice existing in the District of Columbia, which is demonstrated by Appendix A and the newspaper clippings, mandated a change of venue to a more favorable venue.

B. *The Majority Opinion*

The majority opinion states:

> We believe, however, that it is inappropriate to attempt to formulate a supervisory power standard for concluding that a fair jury cannot be selected.

Majority opinion at —— of 181 U.S.App.D.C., at 62 of 559 F.2d. The Supreme Court, however, *has* formulated a supervisory standard in venue matters. The present Chief Justice and Mr. Justice Marshall and Mr. Justice Clark have so written. 421 U.S. at 798, 804, 95 S.Ct. 2031; 373 U.S. at 728, 83 S.Ct. 1417. The majority should acknowledge that it exists and apply it.

The reasoning of the majority opinion turns on the notions that identifying and applying such a standard would be hard to do (Majority opinion at ——-—— of 181 U.S.App.D.C., at 62–63 of 559 F.2d), the trial would not be fairer (*id.* at ——-—— of 181 U.S.App.D.C., at 63 of 559 F.2d), and that, after all, if trial courts are permitted to deny changes of venue for presumptive prejudice and to go on to the *voir dire*, more information on prejudice would be available (*id.* at ——-—— of 181 U.S. App.D.C., at 63 of 559 F.2d).

It is true that *voir dire* is potentially a valuable tool for discovery of prejudice, but that observation is irrelevant to the issue of whether a supervisory or constitutional standard is to apply in weighing the information on prejudice. Also, as held in *Marshall, supra*, there are cases in which *voir dire* is pointless. Further, the trial could not help but tend to be more fair if the venue were laid where *only 37%* of the

people (as in Richmond) already thought the defendants guilty, instead of *some 61%* (as in the District of Columbia), and there is no doubt that many communities could have been found where the presumptive prejudice was substantially less.

As to the standard, the court here is simply walking away from its duty. The majority thus whisks the law away at whim.

The appellants here are criminal defendants in federal court. They have a right to be judged by federal standards—the same as all other federal defendants. Federal judges have a sworn duty to apply federal standards, as denominated by the Supreme Court, to the facts of this case. The federal judges here have not done so. No consideration whatsoever has been given to the existence of potential prejudice above the bare minimum constitutional obligation.

VI. THE LAW APPLIED TO THE MAY 1, 1974 MOTION

The task of this court is to apply the federal supervisory standard for presumptive prejudice to the facts of this case.

A. *The Remedy*

The first step in analysis is to clarify the precise remedy and to identify its costs. The remedy was *not* delay. It was *not* a continuance. It did *not* entail additional national agony in delaying the trial and its resolution. The remedy was simply for the trial to be held in practically any place other than Washington, D.C. Moreover, the District Judge was not barred from himself travelling with the case and trying it. The interests of the country in a prompt trial and supervision of a fine judge were simply not at stake. To say that they were is to completely evade the law as to change of venue. The fact is that had such change of venue been made, the issue of the fairness of the trial, on the venue point, would have been completely obliterated from the case. Why the Government and the trial court would want to hazard a criminal trial in which the evidence of guilt was as strong as it was here by insisting on trial in a jurisdiction where presumptive prejudice existed to the extent that it did here, defies reason. Delay and the selection of the judge were not issues, and the issue of possible additional trial costs in the new venue was not raised (Docket Nos. 142, 180).

The Government had absolutely nothing to lose by trying the case in a community where presumptive prejudice was at a minimum, and to say that it did have something to lose is to admit that the case should have been transferred.

A factor that compelled use of the simple venue safeguard in this case was that the United States Senate had expressly chosen to televise its hearings in *spite* of the Watergate Special Prosecutor's request, out of concern for defendants' fair trial rights, that there be *no* television coverage. The Senate reported:

> The committee's interest in televised hearings was not to obtain publicity for publicity's sake. The facts which the committee produced dealt with the very integrity of the electoral process; they were facts, the committee believed, the public had a right to know. Most citizens are not able personally to attend the working sessions of their Government. Although thousands of people spent short periods in the Caucus Room during the hearings, these visitors represented only a small percentage of the electorate. Thus, it was desirable that every citizen be able to view the hearings, if not in the Caucus Room, then in his home or place of business. The ability to read about the hearings in the printed media was not sufficient. The full import of the hearings could only be achieved by observing the witnesses and hearing their testimony.
>
> It was for this reason that the committee opposed the efforts in Federal court of Special Prosecutor Cox to proscribe television and radio coverage of the testimony of Magruder and Dean. *The Special Prosecutor's expressed concern was that public hearings might prejudice future criminal trials.* It was the committee's position that they would not, but, *even if they did, it was more important in this period of crisis and national concern that the full facts be promptly made known.* The public should not have to wait a year or more until the Watergate trials were over to know the scope of the corruption in its Government.

S.Rep. No. 93-981, 93d Cong., 2d Sess. XXXI-XXXII (1974) (emphasis added). This statement speaks for itself and indicates that the Senate hearings were unconcerned with the prejudice they might cause to future criminal trials. Given this decision, and the nationally televised and printed coverage it created, simple fairness commanded that the trial be located in some community where there lay a minimum prejudgment of guilt.

One other element of cost should be explicitly stated. It is the cost now, in 1976, of reversing the convictions for a retrial of these cases where the Government's evidence is massive. The cost includes reopening old wounds. The cost may also include public exasperation and disillusionment. The cost certainly would include the dollar outlays for a new trial. *But the existence of the federal supervisory rule requires such disposition and the only court in this land that can alter the existing rule is the Supreme Court of the United States.* The law is otherwise clear, and this court is bound to apply it. Our constitutional guarantee of a fair trial includes the absolute right to an open-minded jury and, as the Supreme Court held in *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), with respect to the right to be tried *only* on felonies charged in an indictment by a grand jury, the denial of such right cannot be treated as harmless error.

B. *The Supervisory Standard and the Publicity in this Case*

We know that the proposition in *Marshall*, a federal case, is that

> . . . persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced.

4. *See, e. g., Doonesbury* comic strip in The Washington Post, Aug. 13, 1974, § B at 10, *id.*, Aug. 12, 1974, § B at 8, *id.*, July 27, 1974, § E at 50, *id.*, July 25, 1974, § F at 16, and *Herblock* cartoons in *id.*, Aug. 11, 1974, § C at 6, July 28, 1974, § C at 6.

421 U.S. at 798, 95 S.Ct. at 2035. In this case, as stated *supra*, the defendants were the subjects of a massive wave of media coverage which is without parallel in legal history, which was extraordinarily heavy in Washington, D.C., and which, on the unrefuted record, *led some 61% of Washington, D.C. area residents to conclude that the defendants were guilty, before trial, with only some 2% believing them innocent and the rest withholding judgment.* On the same record, to a level of statistical near-certainty, this was not the case in such other locales as Delaware, Southern Indiana, and Richmond, Virginia.

The Washington press commentary included substantial, unending vituperative statements, of which these were typical:

> Honesty and following those orders [from Haldeman and Ehrlichman] were inconsistent.
>
> He [Haldeman] stayed behind the scenes, using loyal aides to do the dirty work

See p. —— of 181 U.S.App.D.C., p. 142 of 559 F.2d, *supra*. The newspapers were saturated with adverse comments, political satire and cartoons, and even a comic strip attacked the defendants.[4]

This was *not* a case in which the defendants were asking to go somewhere where the jury pool would represent a clean or neutral slate: it is a case in which they sought simply to go someplace where the smallest possible portion of the jury pool had concluded in advance that they were *guilty*.

Additional high dollar costs, delay, and change of judge were not involved.

In determining the proper applicability of the supervisory standard declared in *Marshall*, that case cannot be distinguished from this case on the basis that the jurors had improperly learned of a prior *conviction* of the defendant, instead of some other adverse information, because *Rideau*, which was a constitutional case, was reversed

where the publicity did not involve any conviction. The federal supervisory standard is broader than the constitutional standard and can be violated by the possibility of prejudice in any form. Jury prejudice is not limited to publicity of a conviction or a confession.

The disclosure in *Rideau* involved a confession on television before some 106,000 viewers in three separate showings in a population of some 150,000, or nearly two thirds of the populace, assuming some small allowance for overlap in the audience among the three showings. 373 U.S. at 724, 83 S.Ct. 1417. In this case the principal defendants were dismissed from high office in a wave of publicity that led *nearly two thirds of the population of Washington, D.C. to believe they were guilty before trial*. Moreover, *eight of the twelve ultimate jurors actually viewed* portions of the television hearings from which the Senate perjury counts were brought (Tr. 634, 842, 987, 1181–82, 1355, 1427, 1680, 1911). There was therefore the obvious possibility that these *jurors* in the case were actual *witnesses to the charged crime*, a frequent cause for disqualification as a juror. The adversary nature of those hearings may have created fixed impressions in the viewers and turned them into partial partisans for one side or another. They may have tended to side with Senator Ervin as many did. The percentage of nearly two thirds is the same in both *Rideau* and this case. In *Rideau*, the Supreme Court said that for the people exposed to the publicity, the publicity was the trial. 373 U.S. at 726, 83 S.Ct. 1417. The same might be said of the Senate Hearings as presented on television. And *Rideau* was a *state* court trial and therefore, a constitutional case. If percentages are to govern there, then it is even clearer that they should govern in a *federal* case, where a broader standard than the constitutional standard applies.

C. *The Evidence from the Voir Dire*

The majority opinion explores the *voir dire* that was actually held subsequent to the denial of the change of venue motion. The *voir dire* confirms the conclusion from the evidence that the venue should have been changed at the beginning of the case, on the basis of presumptive prejudice.

The *voir dire* began with preliminary questions directed to groups of members of the venire, in order to explore such matters as reading the indictment, determining if any person on the venire knew participants in the trial or if they might tend to disbelieve a witness because the witness had pleaded guilty in another case, and to inquire into scheduling or medical difficulties that would prevent those on the venire from serving. Tr. 1–541.

The court then asked a standard set of questions of members individually. This individual questioning produced the panel of twelve that was ultimately charged with the case. Because of the importance of the context and sequence of this individual questioning, and as a typical example for ease of reference, the individual *voir dire* of one of the twelve jurors, John Hoffar (Tr. 928–49), is set out as Appendix B to this opinion. (Hereafter Hoffar *Voir Dire*. The other eleven jurors were Gladys Carter (Tr. 607–19), Roy Carter (Tr. 619–34), Ruth Gould (Tr. 832–51), Anita King (Tr. 1075–97), Marjorie M. Milbourn (Tr. 1172–1216), Vanetta M. Metoyer (Tr. 1216–29), Dock Reid (Tr. 1350–61), Jane M. Ryon (Tr. 1420–42), Thelma L. Wells (Tr. 1673–96), Sandra Y. Young (Tr. 1876–1901), and Helen D. Pratt (Tr. 1901–17).

1. The Role of *Voir Dire* and the Facts of *Rideau*

The first and singular aspect of the *voir dire* is that it confirms the pervasiveness of the coverage of this case in Washington, D.C. The trial judge says flatly:

> Think of it. The publicity that breakin got. *I said, this is incredible.*

Tr. 487 (emphasis added). And:

> *If anybody gets on the stand and tells me they never heard of this case or read about it, I will exercise a challenge for cause. That is how I feel about it.*

Id. (emphasis added).

The heart of the problem thus created is encapsulated by the authors of the ABA

Standards Relating to Fair Trial and Free Press:

> It has in many jurisdictions been common practice for denial of such a [change of venue] motion to be sustained if a jury meeting prevailing standards could be obtained. There are . . . difficulties with the approach . . . many existing standards of acceptability tolerate considerable knowledge of the case and even an opinion on the merits on the part of the prospective juror. And even under a more restrictive standard, *there will remain the problem of obtaining accurate answers on voir dire—is the juror consciously or subconsciously harboring prejudice against the accused resulting from widespread news coverage in the community?* Thus if change of venue and continuance are to be of value, *they should not turn on the results of the voir dire; rather they should constitute independent remedies designed to assure fair trial when news coverage has raised substantial doubts about the effectiveness of the voir dire standing alone.*

ABA Standards, *supra* p. 21, at 126 (emphasis added).

The indisputable fact in the majority's own analysis of the *voir dire* is that the exposure of the venire and final jurors to prejudicial pretrial publicity in this case was at least as heavy as the exposure of the venire and final jury in *Rideau*. We already know, from the unrefuted record, that not only had well over two thirds (93%) of the entire Washington, D.C. population been exposed to the publicity, as in *Rideau*, but nearly two thirds *thought the defendants guilty*. The majority writes:

> Appellants claim that 52% of the veniremen questioned individually had an inclination, "ranging in intensity from mere suspicion to absolute certainty," toward a belief in guilt. Mitchell br. at 96. The Government maintains that only 8% of those questioned indicated an opinion of guilt that could not be set aside. In all, the Government identifies 29% of the venire as having had an opinion of appellants' guilt and another 7% as possessing an "arguable predisposition against defendants." Govt. br. at 243.

Majority opinion at —— of 181 U.S.App. D.C., at 70 of 559 F.2d n.56. But this is exactly the argument which was rejected by the majority in *Rideau*. As Mr. Justice Clark wrote there, *dissenting* from the majority's finding of presumptive prejudice:

> The most crucial evidence relates to the composition of the 12-man jury. Of the 12 members of the panel only three had seen the televised interview which had been shown almost two months before the trial. The petitioner does not assert, and the record does not show, that these three testified to holding opinions of petitioner's guilt. They did testify, however, that they
>
> > "*could lay aside any opinion, give the defendant the presumption of innocence as provided by law, base their decision solely upon the evidence, and apply the law as given by the court.* As the judge stated in his per curiam: 'They testified they could do so notwithstanding anything they may have heard, seen or read of the case.'" *State v. Rideau*, 242 La. 431, 462, 137 So.2d 283, 295.
>
> . . . . . .
>
> The determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge. And when the jurors testify that they can discount the influence of external factors and meet the standard imposed by the Fourteenth Amendment, that assurance is not lightly to be discarded.

373 U.S. at 732, 733, 83 S.Ct. at 1422. Nevertheless, the *majority* of the Supreme Court in *Rideau* found *presumptive prejudice* in that constitutional case and thereby held that the trial court should have granted a change of venue before the *voir dire* was ever reached. In this supervisory case, with its broader standard, and with the virtually costless remedy of a simple and prompt change of venue upon defendants' motion, the result is a *fortiori* the same. The case law leaves no other exit. To ar-

gue otherwise is to play shell games with the cases and to avoid the duty of the court.

2. The Futility of *Voir Dire* in this Case

The purpose of *voir dire* is to enable court and counsel to engage in a rational analysis of a potential juror's attitudes regarding a case. Conclusory and ultimate questions of the nature of "Are you unfairly biased in this case?" are next to useless in such an inquiry.

In the *voir dire* the trial court restricted its inquiry to what the candidate remembered *in particular* from the pretrial publicity:

> THE COURT: Look, listen, all of you know I have been in this case—not this particular case, the so-called Watergate affair, since 1972, I think.
>
> I heard and listened, I have known Mr. Mardian, Mr. Mitchell, favorably, Mr. Parkinson. I listened to some of the testimony and if you asked me under oath what did Mr. Mitchell say on a certain date, what did Senator Irvin [*sic*] say on a certain subject to him, I couldn't conscientiously tell you under oath.
>
> *And I think that is the reaction of the average person. People soon forget. The old saying there is nothing staler than yesterday's news.*
>
> *Unless something particular comes out which stands out in a person's mind*, and I remember the incident of my good friend John Wilson about the Jap situation, that I remember. I will never forget that.
>
> MR. WILSON: I wish you hadn't mentioned that.
>
> MR. FRATES: Again, for the record, Your Honor, we want to challenge that juror and all remaining jurors for cause on those grounds set out in our motion *on the massive pretrial publicity*. And may we have that as a standing objection to each one?
>
> THE COURT: Yes.

Tr. 509–10 (emphasis added). As put to Juror Hoffar, the court's question was:

> Does anything you may have heard or discussed about this matter *particularly* stand out in your mind? Any one thing or several things?

Hoffar *Voir Dire* at 932 (emphasis added), Appendix B *infra* at —— of 181 U.S.App. D.C., at 181 of 559 F.2d. As for the other jurors, to the same effect, see Tr. 610, 623, 836, 838, 1079, 1176, 1219, 1352, 1428, 1428, 1678, 1882, 1907.

In thus restricting its inquiry to *particular* instances, the trial court was helpless in the face of the permanent psychological impact that the whole of the absolutely unprecedented publicity in this case had in the Washington, D.C. area. Given the gigantic scale of the case, the years of publicity, and the inevitable blurring of the avalanche of detail, the restriction of inquiry to particular instances, although earnest and well-meant, was useless. What the court did not recognize was that people forget particulars but do form lasting general opinions and impressions.

Rudolf Flesch, author of Why Johnny Can't Read, explains the futility of the trial court's approach in The Art of Clear Thinking (Collier-MacMillan) 165–66 (1969):

> During World War II, a team of psychologists studied the propaganda effect of orientation films. Among other things, they tried to find out whether films changed the opinions and attitudes of soldiers who saw them, and whether and how these changes lasted. They had a hunch that the effect of the films would gradually wear off and that after some time, soldiers would forget the factual details and revert to their original opinion.
>
> This idea may seem rather obvious to you. It seemed obvious to the psychologists too—but, being scientists, they decided to test it anyway. So they gave the soldiers a test after one week and another test after nine weeks.
>
> As expected, the soldiers had forgotten most of the facts in the film during those eight weeks. But, "clearly contrary to the initial expectation," the general propaganda effect of the film—*the opinion change*—had considerably *increased* [emphasis in original] between the first and the second test. There was not the slightest doubt about it: the soldiers had forgotten the details of the film but its message had sunk in deeper.
>
> The research team cheerfully accepted this unexpected fact and immediately proceeded to account for it by a hypothesis. They found that it could be explained through a theory by the British psychologist, Bartlett, published in 1932. Bartlett had written that "*after learning, that which is recalled tends to be modified with lapse of time in the direction of omission of all but general content and introduction of new material in line with the individual's attitudes.*" *In other words, as time passes, we're apt to forget details but reinforce* ["reinforce" emphasized in original] *what we remember of the general idea.*

(Emphasis added). Thus, the circumstance that prospective jurors stated they could not recall particulars did not negate the strong possibility that they had formed and retained some general opinions about what they had seen and heard.

Given the record of the unequalled blanket press coverage and the Sindlinger Survey results, Judge Sirica's vow to challenge any person disavowing knowledge of this case, and the jurors' uniform affirmation of familiarity with the case (Tr. 610, 623, 836, 932, 1079, 1176, 1219, 1352, 1423, 1677, 1881, 1907), there is no question that "learning" in the psychological sense had taken place. General and ingrained attitudes were all that remained. Not one of the jurors had any "particular" recollections, save for Juror Gould's single recollection that the "tape part" was important (Tr. 610, 623, 836–51, 932, 1080, 1176, 1220, 1352, 1423, 1678, 1882, 1907). In fact, in juror Milbourn's case the exchange was:

> THE COURT: Does anything that you may have heard or discussed about this matter particularly stand out in your mind that you can recall or do many things stand out?
>
> JUROR MILBOURN: *There is so much that I wouldn't know.*
>
> THE COURT: You couldn't recall one particular thing, is that correct?
>
> JUROR MILBOURN: No.

Id. at 1176 (emphasis added). This demonstrates the fallacy of the court inquiring about particulars and refusing to ask *what* opinions were held.

And in Juror Ryon's case:

> THE COURT: Now, does anything you may have heard or discussed about this matter particularly stand out in your mind?
>
> JUROR: (No response.)
>
> THE COURT: Is there anything that stands out?
>
> JUROR: I am sorry to say that I don't really, you know, *remember everything I heard.*

Id. at 1423 (emphasis added). In *none* of the cases, not in Juror Gould's, Milbourn's, Ryon's, or in any other juror's case, was the response to the question of "particular" recollection followed up to learn what, if any, opinion they did hold, notwithstanding the defendants' standing objection that some such effort be made. *Without the data from such inquiry, defendants could not test the juror's conclusory statement that he could try the case fairly.*

Worse, the failure to inquire into what opinions the prospective jurors did hold gave free rein to the tendency of the jurors toward "omission of all" evidence,[8] except evidence conforming to the original (prejudicial pretrial) publicity.

This case is unique—*every one* of the actual jurors had been exposed to the pretrial publicity; most had witnessed the Senate hearings on television, but over time, *of course* the "particular" details faded in their minds. This being so, when the court limited its questioning to whether anything *particular* stood out, it deprived defendants of those tools for finding possible prejudice in the jury that would have been provided by a more penetrating *voir dire*. But this is only to say that this case is one involving presumptive prejudice, a category already defined by the law, and for which a simple and virtually costless remedy, timely re-

8. This tendency was documented in The Art of Clear Thinking, *supra*

quested by defendants, was available to the trial court: change of venue.

3. Coaching By the Trial Court

Judicial notice may be accorded the fact that, once there has been a screening for those who cannot serve due to medical reasons or personal schedule, many persons on the venire wanted to be picked to serve. The desire is a natural and understandable one. The regular compilations of comments of jurors accumulated by the District Court in this circuit attest to this fact.

For this reason, however, and generally, the trial court should steer clear of giving the prospective juror leading suggestions of suitable answers to be given to accomplish that objective. The obvious first danger to avoid is to not tell a prospective juror the legal standard by which impartiality will be judged *before the question itself is asked.* The Hoffar *Voir Dire* is typical and instructive.

The trial court begins by reminding the juror, before the parties and counsel, that his or her selection is at issue:

> This is . . . to determine whether or not you have the qualifications to be selected to be on this jury . . .

Hoffar *Voir Dire* at 928–29, Appendix B *infra* at —— of 181 U.S.App.D.C., at 179 of 559 F.2d. Then, the first question on bias is asked in a phrase that warns the juror that, of course, the juror has not yet heard the evidence:

> Do you believe at this very moment, and *without having heard any of the evidence* . . . that any Defendant in this case is *guilty* . . . ?

Id. at 930, Appendix B *infra* at —— of 181 U.S.App.D.C., at 180 of 559 F.2d (emphasis added). That is a loaded question. The natural inclination, unless a very strong opinion of guilt is held, would be to deny that one believed a person to be guilty, without having heard any of the evidence. The simple inquiry should be, "Do you presently have an opinion as to the guilt of any defendant in this case?" The trial court goes on to say,

> Now . . . I am going to question you as to what you heard or read about the case to decide if you can be qualified to serve . . .

Id. at 931, Appendix B *infra* at —— of 181 U.S.App.D.C., at 180 of 559 F.2d. And,

> . . . *we would like to get a jury where each juror is able to put aside anything he or she may have read or heard and any opinion* . . . *and decide* . . . *solely on the evidence* . . . *and* . . . *instructions* . . .
>
> *Now, I want to be sure, and counsel on both sides want to be sure, that you can decide this case for yourself based solely from what you hear in this courtroom* at the proper time.

Id. (emphasis added). And,

> Now the Government and the Defendants in this case are entitled to have this case decided on its merits, that is, on the evidence presented in open Court and pursuant to the law as the Court will try to explain it to the jury at the end of the case. *You must not be influenced, of course, by any events that transpire outside of the courtroom.*

Id. at 938, Appendix B *infra* at —— of 181 U.S.App.D.C., at 183 of 559 F.2d (emphasis added). Thus, the prospective juror was told how to answer the court's questions if he wanted to serve.

Later, of course, followed the Court's question:

> THE COURT: Does any reason whatsoever suggest itself to you at this time why if you are selected to serve on this jury you feel you could not listen to the evidence objectively and the testimony and at the proper time render or vote for a verdict or join in a verdict which will be based in your opinion *solely upon the evidence that will be offered in open Court* and the instructions on the legal principles involved of the law, in other words, applicable to the case?
>
> JUROR HOFFAR: No, sir.
>
> THE COURT: No reason whatsoever?
>
> JUROR HOFFAR: None that I can think of offhand.

Id. at 940, Appendix B *infra* at —— of 181 U.S.App.D.C., at 183–184 of 559 F.2d (emphasis added). The answer was plainly that earlier suggested.

The defendants had objected to this technique:

> MR. STRICKLER: I have one observation which I would like to make.
>
> We are asking the jurors factual questions to elicit facts. I believe Your Honor has approached this by way of telling them that the law is in advance which, in effect, can suggest an answer to these jurors and on the subsequent groups that come in I would like to request the Court not to give them the law which may suggest an answer, but just go after the facts.
>
> THE COURT: I will just have to use my own judgment and do what I think at the time is right.
>
> I will keep your request in mind.

Tr. 537.

But the objectionable practice continued. Advertently or not, these preambles to key questions could only add to the possibility of biased, unrevealing, and conclusory responses. The *voir dire* was thus improper and unrevealing of critical attitudes. Certainly, with 93% of the venire having prior knowledge of the case (Appendix A at —— of 181 U.S.App.D.C., at 178 of 559 F.2d), at some point the prospective jurors should have been asked: "What opinion did you reach?" They must have arrived at some opinion, and the parties were entitled to know what that opinion was.

4. The Trial Court's Standard of Juror Neutrality

The standard of neutrality used in this case was stated by the trial court:

> Does any reason whatsoever suggest itself to you at this time why if you are selected to serve on this jury you feel you could not listen to the evidence objectively and the testimony and at the proper time render or vote for a verdict or join in a verdict which will be based in your opinion solely upon the evidence that will be offered in open Court and the instructions on the legal principles involved of the law, in other words, applicable to the case?

Hoffar *Voir Dire* at 940, Appendix B *infra* at —— of 181 U.S.App.D.C., at 183 of 559 F.2d. But this misses the complete test of neutrality by a significant omission. Particularly in notorious cases, saturated with publicity, the accurate test includes the prerequisite that the prospective juror at the outset of the case have no opinion as to guilt "*which would require evidence to remove.*" *Beck v. Washington*, 369 U.S. 541, 557, 82 S.Ct. 955, 964, 8 L.Ed.2d 98 (1962) (emphasis added).

In the June 12, 1974 hearing on the change of venue motion, the trial court pointed out how the *voir dire* was used in other highly publicized trials in which he participated. *Supra*, pp. ——, —— of 181 U.S.App.D.C., pp. 147, 148 of 559 F.2d. Reference to still other notorious cases is instructive as to the use of an accurate and scrupulous test of neutrality. Perhaps no better example lies in our legal history than the trials resulting from the Teapot Dome Scandal.

Prior to the Watergate affair, the investigations and trials of the principals in the Teapot Dome Oil Scandal generally held the modern day American record for sustained interest and publicity. Of course, today, with television, wider radio reception, and the entire news media vying with each other in what has come to be called investigative journalism, the publicity resulting from the Watergate break-in, the trial of the participants, the Senate (Ervin) Investigating Committee, the House impeachment hearings, the resignation of the President, the issuance of a presidential pardon, and the subsequent indictment and trial of appellants has far exceeded that of Teapot Dome.

The present case, involving as it does high federal officials in a criminal trial with substantial political overtones and a tremendous amount of pretrial publicity are in those respects similar to the Teapot Dome trial of Albert B. Fall, Secretary of the Interior in the Harding administration (*Fall*

v. United States, 60 App.D.C. 124, 49 F.2d 505, *cert. denied*, 283 U.S. 867, 51 S.Ct. 657, 75 L.Ed. 1471 (1931)). Because of these similarities it is relevant to consider the procedures followed in selecting the Fall (Teapot Dome) jury.

Secretary Fall was tried on a charge of bribery for allegedly receiving $100,000 from Edward L. Doheny to influence his decision in awarding the construction contract for certain oil storage tanks in Hawaii and for the delivery of "royalty oil" from Naval oil reserves to the corporation of which Mr. Doheny was president.[6] The publicity this case received was extensive and extended over many years. Consequently, when the trial of Secretary Fall on the bribery charge began on October 7, 1929, a great many of the jurors indicated that they had previously read about the charges in the newspapers and had heard it on the radio and in general conversation. The influence of this pretrial publicity on the panel drawn for jury service was thus an issue when the jury was selected. Consequently, they were all interrogated as to the effect of such prior knowledge and publicity. A number of the veniremen indicated that they had formed an opinion, and it is important and relevant to note the standard that the trial court applied in determining whether the prospective jurors were to be considered sufficiently impartial to try the case.

Without exception, the standard applied was whether the prospective juror had an opinion at the time he was examined that would *take any evidence to set aside*. If his mind was in that state he was excused by the court without any further argument.

The following references to the *voir dire* in that trial indicate the standards and interrogation procedures that were applied by the court, the defense, and the prosecutor in seeking an impartial jury. The first juror to indicate that he had an opinion was asked, "When you came into court today you did not have an open mind?" His reply was that it would take evidence to remove the opinion that he already had. He was thus, without more, challenged and excused (Tr. 12–13).[7]

The next juror that indicated he had formed *any* prior opinion was asked whether he would "require evidence to remove that opinion" (Tr. 17), and when he indicated that he would he was excused. One juror who admitted to a "slight opinion" only, but who on further inquiry indicated that he would want "evidence to reverse" that slight opinion, was challenged and excused notwithstanding his assertion that he could lay aside that slight opinion. In contesting the challenge of this juror by the defense, one of the prosecutors, Mr. Roberts (later Justice Roberts), stated the standard he thought should be applied when he addressed a question to the juror, inquiring whether that juror could utterly lay aside any opinion formed tentatively *at the start*, listen to the case from start to finish, and form an opinion from the evidence and that only. The juror replied "I think so" (Tr. 47–48), but he was nevertheless stricken and excused by the court on the challenge of the defense because he had previously indicated it would take some "evidence to reverse" his opinion. Another juror who stated that he had heard about the case was asked whether he would go "into the jury box . . . with a clear mind" (Tr. 59). This is an entirely different standard from that used here of inquiring whether the venireman had a "fixed opinion" that would prevent him from following the court's instructions "*at the end of the case*."[8]

6. The trial was in the Supreme Court of the District of Columbia (the predecessor to the U.S. District Court for the District of Columbia) on Criminal No. 42304 on the indictment returned June 30, 1924.

7. References are to the October 7, 1929 transcript in the U.S. Archives in the case in the Supreme Court of the District of Columbia, No. 42304, entitled *United States v. Albert B. Fall*. This case involved the indictment returned June 30, 1924 for violation of the bribery section of the criminal code, *i. e.*, § 117 of the penal code, 18 U.S.C. § 207 (35 Stat. 1109).

8. Hoffar *Voir Dire* at 939, Appendix B *infra* at —— of 181 U.S.App.D.C., at 183 of 559 F.2d.

Another venireman indicated that from reading newspapers, he had formed an opinion "in a way" (Tr. 75–76), which he could not lay aside notwithstanding the fact that this was only a slight opinion. He was interrogated about it, and when he indicated that he could not "keep it out of the case," he was excused (*id.*). Had he been asked whether he could follow the court's instructions at the *end of the case* he might have answered yes, and by the standard here applied he would not have been considered disqualified.[9]

Another venireman, who was excused, stated that he read quite a bit and formed an opinion, and he was asked whether he would be "starting afresh." He replied "I would be going in with a little load on my shoulder." When this situation developed, Mr. Roberts inquired "without the Government having opened its mouth or offered any evidence, you would be inclined to think that you would want to hear what the defense would have to say." "Yes." *Excused* (Tr. 100).

Another venireman admitted that he had read newspapers five years previously and that he would have formed an opinion at that time, but he stated: "Don't know that I formed an unalterable opinion." He was then asked if he "would want some evidence before [his opinion] could be changed." His affirmative answer resulted in his discharge from the jury (Tr. 112).

It is clear from this history of the Teapot Dome trial that the court applied the standard that, regardless of the strength of the opinion held by the venireman, if it would take any evidence to set aside that opinion, the venireman did not possess the requisite open mind *at the start of the trial* that was required of a juror in a criminal case and was not qualified to sit on the jury.

Because of the Supreme Court's several citations of the specific question as to whether it would take evidence to set aside a juror's opinion, the importance of that question in this case is evident. As noted, the allusion in *Beck*, *supra*, was to an opinion "*which would require evidence to remove*." In *Irvin v. Dowd*, *supra*, the Court wrote:

> Two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with material facts and circumstances involved, including the fact that other murders were attributed to him, some going *so far as to say that it would take evidence to overcome their belief*.

366 U.S. at 728, 81 S.Ct. at 1645 (emphasis added). It thus appears that the *voir dire* there inquired according to the proper standard. The foregoing passage from *Irvin v. Dowd* is specifically noted in *Murphy*, *supra*, 421 U.S. at 798, 95 S.Ct. 2031.

However, unlike the interrogation of the venire in the Teapot Dome case, the *voir dire* here generally tended to be confined to questions that sought in a black or white way to determine whether the person being questioned had a *definite* opinion as to guilt or innocence rather than attempting to ferret out what in-between views and leanings he did have based on all he had seen and heard. The broader inquiry, however, was necessary in order to permit counsel to form the judgments necessary for an intelligent exercise of their challenges to the venire. But the court relied on bare statements by the juror that he did not "have any prejudice, bias, sympathy or *fixed* opinion" and that he could "render a fair and impartial verdict . . ." (emphasis added). (Hoffar *Voir Dire* 939, Appendix B *infra* at —— of 181 U.S.App.D.C., at 183 of 559 F.2d). The defense objected to this:

> MR. WILSON: May it please the Court, it is very obvious to me this juror has not been forthright with you.
>
> THE COURT: If it is obvious to you, it is not obvious to me, Mr. Wilson.
>
> MR. WILSON: I am the one to be concerned about it.
>
> THE COURT: I am just as concerned as you are that these men get a fair trial in my courtroom, I want you to understand that.

9. *Id.*

MR. WILSON: I understand that, but it helps us a lot if you will find out what he—he equivocated with you as to whether he heard it discussed and if it was discussed, he at one time said, sure, they are guilty and some other time somebody advocated to the contrary and said they weren't guilty. *This man stopped short of the crucial answers. If he has not an opinion, he has got a view.* It is just as clear to me as it is possible to be.

THE COURT: Obviously, he is not one of these so-called intellectuals but I think he is a man that has good common sense and that to me is important.

Let's proceed.

Id. at 946–47, Appendix B *infra* at —— –– —— of 181 U.S.App.D.C., at 186 of 559 F.2d (emphasis added). Hoffar was then called back for additional questioning, but again the interrogation related to opinions on "guilt or innocence." When the one question was asked whether he had an "open mind" and the reply was, "As far as forming a *definite opinion*, I have an open mind" *id.* at 945, Appendix B *infra* at —— of 181 U.S.App.D.C., at 185 of 559 F.2d (emphasis added), no attempt was made to determine from this equivocal answer how far his mind was short of a *definite* opinion or whether he held any opinions that might take evidence to erase.

The relevance of the court's disposition on the basis of whether one is an "intellectual" or has "common sense" is not apparent. The issue was the scope of the questioning.

The trial court's questioning in most instances simply did not probe sufficiently to permit counsel to have a fair opportunity to obtain a jury that was assuredly qualified under the proper standard. Given the trial court's rejection of the change of venue motion and its own protestation that it would rely heavily and exclusively on the *voir dire*, *supra*, p. —— of 181 U.S.App. D.C., p. 147 of 559 F.2d, the standards of the Teapot Dome court were the least that defendants were entitled to under the law.

5. The Real Possibility of Political Prejudice

Political bias can also be a basis for prejudice, and so can itself be a basis for changed venue. This is made clear in *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed.1137 (1951), a case in which Dennis was charged with conspiring to organize the Communist Party of the United States to overthrow the government of the United States by force and violence, in violation of Section 3 of the Smith Act, 18 U.S.C. § 2385. In rejecting appellant's claim that it was impossible to seat an impartial jury, the court wrote:

> *It was not as though the prejudice had been local, so that it could be cured by removal to another district*;

183 F.2d at 226 (emphasis added).

The public record is that Washington, D. C. is unique in its overwhelming concentration of supporters of the Democratic Party, as opposed to the Republican Party to which the defendants here belonged. The Statistical Abstract of the United States (1973) indicates that the candidate of the Democratic Party for President in 1968 received 81.8% of the total vote cast in the District of Columbia and in 1972 received 78.1% of that vote. The closest state to the District of Columbia in the 1968 election was Massachusetts with 63% of the vote cast for the Democratic Party candidate for President and in 1972 with 54.2% of the vote cast for President. *Id.* at 367. Thus in 1972 the vote for President indicates that the voters of the District of Columbia favored the candidate of the Democratic Party by 44% more than the voters in the next most Democratic presidential voting area in the union. In 1972 the voter turnout in the District of Columbia was 31.5%, but a sample of that magnitude of the population is certainly indicative, and *four* of the sitting jurors had participated in or contributed to campaigns (Tr. 634, 834, 1174, 1674). The trial court here denied defendants' request to know to which party contributions were made (Tr. 568), whereas Teapot Dome jurors were interrogated as to "whether politics or political parties" would affect their

decision.[10] A pro-Democratic bias could imply presence of some anti-Republican bias and vice versa. Such potential prejudice should certainly have been explored. This is particularly so because according to the Sindlinger Affidavit, 11% of those polled in the District of Columbia stated that their "opinions with regard to the guilt or innocence of the defendants" was "most influenced" by their "own political position." This 11% figure for the District of Columbia was nearly twice the 6% figure for the United States as a whole and nearly three times the figure for Richmond (4%), Indianapolis (4%), and Delaware (3%) (Appendix A at —— of 181 U.S.App.D.C., at 179 of 559 F.2d).

This case differs from *Dennis* in that in Washington, D. C., there most emphatically does appear to be a unique island of political bias, and in this case, with its massive political aspects, it would be futile to ignore the possibility that prior to the trial potential jurors may have formed prejudgments of the case based on their political affiliation or leanings. The obvious possibility of an extraordinarily high concentration of bias against the Republican Party defendants, in light of the simple and virtually costless venue remedy available to the trial court, buttressed the facts which required changed venue.

CONCLUSION

It is submitted that there is no principled basis upon which the presumptive prejudice in this case can be distinguished from that in *Rideau* and *Marshall*. The law is that the defendants should have been granted a change of venue on the basis of their May 1, 1974 motion. The law, as it has always previously been applied by this court, is also that this case must be reversed and a new trial granted because of that error.

THE CONVICTIONS ON COUNT 2

I. MISUSE OF THE CIA

The remainder of this opinion must deal with a mystery. All my colleagues normally are very quick to notice plain error, particularly in courts' instructions. So, one must wonder why they insist here upon affirming a conviction on just one count that involves obvious plain error in the court's instructions: the error being that the trial court instructed the jury they could return a guilty verdict on the offense charged in Count 2 *solely* on the ground the defendants committed an offense *not* charged in Count 2 of the indictment returned by the Grand Jury.

It is relatively unimportant to the appellants whether the convictions on Count 2 are upheld because the sentences are concurrent and the conviction on Count 1 involves a *consummated* conspiracy to obstruct justice and to defraud the government agencies. Thus, for this court to act appropriately on the error would not involve any lesser sentence or in any way lessen the nature of the convictions. But it is of the gravest moment what my colleagues do to the law because that will be applied to future cases. We should not confound the law on indictments in this circuit. We are not writing law just for this case alone. Our error will come back to plague us in future cases and the public will eventually suffer.

II. THE HUSH MONEY COUNT

Count 2 of the indictment is the so-called "hush money" count.[11] It charges that the

10. Tr. 52.

11. The entire text of Count 2 is as follows:
The Grand Jury further charges:
1. From on or about June 17, 1972, up to and including the date of the filing of this indictment, in the District of Columbia, and elsewhere, JOHN N. MITCHELL, HARRY R. HALDEMAN, JOHN D. EHRLICHMAN, CHARLES W. COLSON, KENNETH W. PARKINSON and GORDON STRACHAN, the DEFENDANTS, unlawfully, willfully and knowingly did corruptly influence, obstruct and impede, and did corruptly endeavor to influence, obstruct and impede the due administration of justice in connection with an investigation being conducted by the Federal Bureau of Investigation and the United States Attorney's Office for the District of Columbia, in conjunction with a Grand Jury of the United States District Court for the

APPENDIX I

Conversion of Record
to Transcript Citations

Defendants' Citations	Transcript
S.R. Vol. 3, p. 1-267	1st day of trial
S.R. Vol. 4, p. 1-318	2nd day of trial
R. Vol. 6, p. 1-187	3rd day of trial
R. Vol. 7, p. 1-223	4th day of trial
R. Vol. 8, p. 1-273	4th day of trial
R. Vol. 9, p. 1-103	4th day of trial
R. Vol. 10, p. 1-426	5th day of trial
R. Vol. 11, p. 1-399	6th day of trial
R. Vol. 13, p. 1-47	7th day of trial
R. Vol. 12, p. 1-231	8th day of trial
R. Vol. 15, p. 1-288	9th day of trial
R. Vol. 14, p. 1-77	9th day of trial
R. Vol. 16, p. 1-305	10th day of trial
S.R. Vol. 1, p. 1-220	11th day of trial
S.R. Vol. 2, p. 1-250	12th day of trial
S.R. Vol. 5, p. 1-254	13th day of trial
S.R. Vol. 6, p. 1-154	14th day of trial
S.R. Vol. 7, p. 1-217	14th day of trial
S.R. Vol. 8, p. 1-275	15th day of trial
S.R. Vol. 9, p. 1-276	16th day of trial
S.R. Vol. 10, p. 1-71	16th day of trial
S.R. Vol. 11, p. 1-262	17th day of trial
S.R. Vol. 12, p. 1-28	18th day of trial
R. Vol. 5, p. 1-190	Pre-trial - January 11, 1978

APPENDIX J

Opinion, United States v. Capo,

595 F.2d 1086 (5th Cir. 1979)

9. Jury ⇐131(13)

Where court's belief that material published by newspaper during trial had not been disseminated to jury was confirmed by jurors' negative responses to court's questions, court was not required to proceed further in conducting individual examination of jurors.

10. Criminal Law ⇐703

Where prosecutor gave notice just before trial that he intended to introduce evidence of defendants' criminal behavior to show motive, plan, intent, and identity, and where prosecutor and defendants were verbally informed that all pretrial motions, including defendants' motion in limine, were denied, prosecutor's opening argument including statements concerning defendants' marijuana offenses in Louisiana was made in good-faith belief that evidence concerning such offenses was admissible in prosecution for possession of marijuana and conspiracy to possess marijuana in Florida. Fed.Rules Evid. rule 404(b), 28 U.S.C.A.

11. Criminal Law ⇐721(3)

Criterion by which prosecutorial statement is appraised to determine if it constitutes comment on defendant's silence at trial is whether it can be inferred that prosecutor's manifest intention was to comment upon defendant's failure to testify or if comment was of such a character that jury would naturally understand it to be a comment on defendant's failure to testify.

12. Criminal Law ⇐721(3)

Although viewed in naked form apart from remainder of closing argument, prosecutor's statement, when combined with gesture, appeared to be remark on defendants' failure to take stand, reading of closing argument in its entirety indicated that reference was to overall conduct of defendants during investigation, not to the refusal to testify at trial; thus, prosecutor neither intended to comment on defendants' silence at trial, nor did jury construe remarks to have such meaning.

13. Conspiracy ⇐47(12)

Drugs and Narcotics ⇐123

Evidence was sufficient to support guilty verdict on charges of conspiracy to possess marijuana and possession of marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

Ken Davis, James P. Judkins, Tallahassee, Fla., for defendant-appellant in No. 78–5244.

Nicholas P. Geeker, U. S. Atty., Pensacola, Fla., Donald S. Modesitt, Asst. U. S. Atty., Tallahassee, Fla., for plaintiff-appellee.

Edwin Marger, Diane E. Marger, Atlanta, Ga., for defendant-appellant in No. 78–5279.

Appeals from the United States District Court for the Northern District of Florida.

Before GEWIN, HILL and FAY, Circuit Judges.

GEWIN, Circuit Judge:

David Capo and brothers David Lukefahr, Stephen Lukefahr and Thomas Lukefahr were tried with four other defendants by a jury on one count of conspiracy to possess marijuana and one count of possession of marijuana in violation of 21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1). The jury convicted appellants but their four codefendants were acquitted. Capo was sentenced to 4 years imprisonment, 2 years parole and a $10,000 fine on the conspiracy count and 3 years imprisonment for possession, the sentences to be served consecutively. The Lukefahrs each received consecutive 5 year sentences and $15,000 fines on each count. On this appeal, appellants claim they were denied a fair trial by virtue of prejudicial pre-trial publicity, prejudicial publicity during the trial and prosecutorial misconduct. After giving careful attention to each of these contentions, we believe appellants were afforded due process and accordingly affirm.

This case arose from a drug smuggling conspiracy which culminated tragically in the brutal gangland-type murders of four people. In 1976 a government informer, Bobby Joe Vines, planned a drug smuggling operation with a large number of men, including appellants.[1] The conspirators decided to load a large shrimp boat with marijuana and import it into the United States by landing and unloading the boat at the Sandy Creek area near Panama City, Florida.

On Sunday night, January 23, 1977, the plan was put into effect. The conspirators landed at Sandy Creek a seventy foot shrimp boat laden with tons of marijuana. As they were unloading the vessel, two men and two young women, ages 14 and 16, happened innocently onto the scene. Apparently one of the men recognized some of the smugglers. He was shot and killed and the conspirators then fatally shot his three companions. The bodies were taken to a location in Taylor County, Florida, wired to concrete and dumped into a deep sinkhole. These crimes were termed the "sinkhole murders" by the media.

After arrest state murder charges as well as federal charges were filed against appellants. While their trials on the state charges were pending, they were tried in federal court with the four alleged co-conspirators. After appellants were convicted in the instant case, the state charges against them were dropped. According to the briefs two of the four co-defendants who were acquitted of the federal charges were subsequently convicted in state court of first degree murder and sentenced to death.

The trial in the instant case began in January 1978 and consumed 28 days, 10 of which were expended on pre-trial voir dire examination of prospective jurors. The voir dire revealed that as a result of media coverage of the smuggling operation and the sinkhole murders, a significant percentage of the prospective jurors, estimated at 90% by appellants, possessed at least minimal knowledge of the murders, evidence of which was obviously inadmissible in the federal trial, and the connection between the slayings and the drug offenses allegedly committed by appellants.[2]

Prior to trial counsel for appellants repeatedly moved pursuant to Federal Rules of Criminal Procedure 21(a) for a change of venue on grounds that the prospective jurors were prejudiced by the pre-trial publicity. The district court denied the motion. Appellants exhausted their peremptory challenges and requested additional strikes, asserting the same grounds. The trial judge refused to grant this request. Appellants' counsel also challenged both the entire venire and individual veniremen for cause on grounds of their knowledge of the prejudicial information. The court granted ten individual challenges for cause during voir dire but denied the others. At the conclusion of the voir dire, a jury of 12 was selected. Each juror had some slight knowledge of the sinkhole murders but each also had repeatedly pledged his or her impartiality during the voir dire examination.

Appellants present three primary arguments for this court's review. First, they assert that the prejudicial pretrial publicity required the trial judge to grant their motions for change of venue or alternatively, the challenges for cause or requests for additional peremptory strikes. It is appellants' contention that these procedural safeguards were necessary to protect their rights to a fair trial against the prejudice arising from exposure of an alleged 90% of the venire and all of the jurors to local

1. Fifteen alleged conspirators were indicted.

2. In the three months preceding trial, approximately twenty-one stories concerning the offenses were published in the Tallahassee Democrat, the city's largest newspaper. It was determined at voir dire that six jurors had daily subscriptions to the Democrat and that four members purchased it on a regular basis. Moreover, it was shown that since the occurrence of the offenses, a local television station had run 120 different news reports linking the murders and the drug offenses. During these newscasts, the word "Murder" surrounded by a red patch, symbolizing blood, was flashed on the screen. It was estimated that each newscast reached over 200,000 people.

media coverage linking the sinkhole murders to appellants' alleged offenses.

[1] Claims founded on prejudicial pretrial publicity must be assessed in accordance with the due process standards established in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). The Supreme Court in that decision held that the Constitution entitles a criminal defendant not to a trial by a body of jurors ignorant of all facts surrounding the case, but to an impartial jury which will render a verdict based exclusively on the evidence presented in court. 366 U.S. at 722–23, 81 S.Ct. at 1642–1643.

> It is not required, however, that jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id.

[2–4] In determining whether a fair and unbiased jury was empaneled, an appellate court is obligated to make an independent evaluation of the special circumstances involved in the case. *United States v. Williams*, 568 F.2d 464, 469 (5th Cir. 1978); *United States v. Williams*, 523 F.2d 1203, 1208 (5th Cir. 1975). It has long been recognized as a general rule that a defendant, in order to establish a deprivation of due process, must show that potential jurors were actually prejudiced by the pretrial publicity. *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Calley v. Callaway*, 519 F.2d 184, 204 (5th Cir. 1975); *Gordon v. United States*, 438 F.2d 858, 874 (5th Cir. 1971).[3] This burden of proof requires a showing that community prejudice actually invaded the jury box infecting the opinions of the prospective jurors. *United States v. Williams*, 523 F.2d 1203, 1208 (5th Cir. 1975). However, when the defendant proffers evidence of pervasive community prejudice in the form of highly inflammatory publicity or intensive media coverage, prejudice is presumed and there is no further duty to establish actual bias. *Murphy v. Florida*, 421 U.S. 794, 798–99, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600; *Estes v. Texas*, 381 U.S. 532, 542–43, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *Pamplin v. Mason*, 364 F.2d 1, 4–5 (5th Cir. 1966). As this court stated in *Pamplin*:

> Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.

364 F.2d at 5. The cases in which such presumptive prejudice has been found are those where prejudicial publicity so poisoned the proceedings that it was impossible for the accused to receive a fair trial by an impartial jury. The clearest paradigms of such pervasive publicity were the trials in *Estes* and *Sheppard* wherein the press saturated the community with sensationalized accounts of the crime and court proceedings, and was permitted to overrun the courtroom, transforming the trial into an event akin to a three-ring circus.[4]

[5] Having reviewed the record and exhibits, we do not believe that appellants were subjected to prejudicial publicity of such a magnitude that it dominated the proceedings and reduced the trial to a mockery of justice. The trial was held at Tallahassee over 100 miles from Sandy Creek, the site of the crimes, and some distance from the sinkholes where the bodies were discovered. It began almost a year after the occurrence of the alleged offenses. By this time, local news coverage of the conspiracy and the murders had subsided substantially. This is evidenced by the fact that at voir dire most of the prospective jurors and many of the jurors had only a vague recollection of the events that had transpired at Sandy Creek.[5] Moreover, most of the prospective jurors could not recall the name of any person who was accused of participating in the offenses. Given these facts, we fail to perceive the degree of pervasive community prejudice which would warrant a presumption of jury prejudice.

[6] Appellants also have failed to show any prejudice in fact. Rather, the record discloses that the district court took elaborate measures to ensure that an impartial jury was empaneled.

At the commencement of the proceedings, the court conducted a collective voir dire of all prospective jurors, inquiring as to their ability to render an impartial verdict. The veniremen were carefully instructed to decide the case strictly on the evidence presented at trial. The trial judge further admonished them not to discuss the case with anyone, including family members, and not to read any newspaper articles concerning the trial or listen to radio or television accounts of the proceedings.

The court then conducted an individual voir dire of each of the 73 prospective jurors *in camera* in the presence of defense counsel. During the voir dire the trial judge propounded those questions requested by the defense. Each juror was questioned at length concerning the extent of his or her knowledge of the sinkhole murders, the details surrounding the crime, including the victims' ages, and the names of the alleged perpetrators. Each juror was then questioned repeatedly whether he or she had formulated any preconceived notions on the basis of this knowledge and whether he or she was capable of rendering a fair and impartial verdict based on the evidence. Most of the potential jurors who were cognizant of the murder repeatedly professed their impartiality and that they had no fixed impression or opinion as to guilt or innocence. Some ten of the veniremen who appeared to have an opinion were challenged and dismissed for cause.

3. The Supreme Court in *Irvin* articulated the requirement thusly:

> [T]he test is 'whether the nature and strength of the opinion formed are such as in law necessarily * * * raise the presumption of partiality.' The question thus presented is one of mixed law and fact * * * ' [citation omitted]. 'The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside * * * '

366 U.S. at 723, 81 S.Ct. at 1643.

4. Similarly, in *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), a confession illegally obtained from the defendant by the police was filmed by a local television station and broadcast three times in the community where the crime and the trial occurred. The Court held that the widespread dissemination of this highly damaging material rendered the defendant's trial nothing more than "a hollow formality." 373 U.S. at 726, 83 S.Ct. 1417. No showing of actual jury prejudice was required.

5. For example, juror Bradwell stated during voir dire that she had read only one or two articles on the sinkhole murders and had not read any recently. Although she drew some connection between the sinkhole murders and the instant case, she could not recall any of the defendants' names (Supp.R. 4, p. 142). Juror Overstreet stated that she thought there was some connection between the instant case and the sinkhole murders but did not remember any details of the murders. (R. 9, p. 73). Juror Cato stated that although she remembered the sinkhole murders, she recalled only that some "young people were involved" and could not remember the names of any of the alleged perpetrators of the crimes. (Supp.R. 4, p. 49, 56). She further said that she did not associate that occurrence with the instant case or with the defendants. (Supp.R. 4, p. 49–50). The only knowledge juror Golden had about the sinkhole murders was that some bodies had been found in a sinkhole. (R. 8, p. 13). He said he knew nothing about the smuggling operation (R. 8, p. 32). Nor did the name Sandy Creek mean anything to him. (R. 8, p. 13). These and the other jurors stated emphatically that their limited knowledge of the murders would not affect their deliberations and final verdict.

Throughout the arduous 10 day process, the trial judge continually warned the jurors individually and collectively, at the completion of each day, that they were not to discuss the case with anyone or read or listen to any news accounts about the matter. After the completion of voir dire and the striking of a jury, the court repeated these warnings and continued to do so at each recess throughout the 28 day trial.

We are satisfied that the procedural safeguards taken by the court produced a fair and disinterested panel of jurors.[6] In reaching this conclusion, we certainly cannot ignore the jury's acquittal of four of the defendants, two of whom, according to the briefs on file, were subsequently convicted of first degree murder. While this end result is not dispositive of the question of jury prejudice, it does support the trial judge's conclusion that the jurors were unbiased. Viewing the circumstances as a whole, this court is convinced that appellants' due process rights were preserved in the selection of the jury.

[7] As their second contention, appellants claim that the trial court failed to properly determine the jury's exposure to a prejudicial newspaper article which was published and disseminated during the trial. On the third day of trial, Monday, February 13, 1978, appellants' counsel offered into evidence outside of the jury's presence a newspaper article which had appeared as the headline story in the Saturday, February 11, edition of the Tallahassee Democrat. The article's headline read "Convicts lived it up here while they could" and a subheadline stated, "Witness recounts threat on life, p. 1B." The article related that the Lukefahr brothers had been convicted in Louisiana on marijuana offenses and were serving prison sentences in that state when they were brought to Tallahassee on a prison furlough to stand trial. The essence of the article was that upon the Lukefahrs' arrival in Florida, they were released, by mistake, from the custody of federal marshals and consequently resided for a number of days at plush hotels in the Tallahassee area.

Appellants' counsel contended that the article was inherently prejudicial, and requested the court to individually make inquiry of each juror out of the presence of the other jurors to determine if any members had read the article's headlines or content. The prosecutor objected to any further voir dire examination, but the trial judge overruled this objection, stating that he would inquire of the jurors collectively whether any member had "read or heard anything about the case over the weekend." He added that if he received any affirmative responses, he would then conduct an individual inquiry *in camera*. The jury was brought in and the trial judge reminded the panel of his previous instructions to not to listen, read or talk about the case. The jurors were then asked three separate times whether they had read any headlines or articles over the weekend about the trial or watched any television accounts. Each time the court phrased the question differently. Each time the jurors replied in the negative. The trial judge then proceeded with the trial.

6. Appellants argue for the adoption of §§ 3, 4(b), ABA Standards for Fair Trial and Free Press as a supervisory power standard to guide federal courts in dealing with prejudicial pretrial publicity. This recommended rule reads as follows:

> A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession or other incriminating matters, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind.

We note initially that at least one circuit has refused to invoke its supervisory powers to adopt a pre-trial publicity standard. *United States v. Haldeman*, 181 U.S.App.D.C. 254, 559 F.2d 31, 62-63 (1976). We likewise are hesitant to do so in this case where the trial court took appropriate measures, including a vigorous voir dire and repeated instructions, to minimize jury exposure to publicity and ferret out any possible prejudice. Moreover, the ABA criterion, which could be interpreted to disqualify jurors for minimal exposure to prejudicial matter, conflicts with longstanding federal policy embodied in Fed.Rules Crim.Proc. 21(a). That rule states that a change of venue is to be granted for prejudicial pretrial publicity if "there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial ... in that district." This court questions whether a supervisory standard based on minimal exposure is essential to preserving an accused's right under *Irvin* to an impartial jury.

According to appellants, this collective inquiry did not suffice. They assert that the federal supervisory standard adopted by a panel of this circuit in *United States v. Herring*, 568 F.2d 1099 (5th Cir. 1978), requires an individual examination in all cases of publicity occurring during the trial. We disagree. Given the pretrial safeguards instituted by the trial judge to ensure a fair jury and his careful warnings to ignore press accounts delivered at every recess, the collective questioning of the jury was an adequate tool through which to detect prejudice. In addition, in its final instructions to the jury, the court again scrupulously admonished the jurors to "not let sympathy or bias or prejudice influence" them "in any way", and to consider only the evidence presented in court and "not consider, refer to, nor discuss any fact or circumstance except the evidence" admitted at trial. Appellants in our view were fully protected from any possible prejudice.

[8] Furthermore, the voir dire fully satisfied the requirements of *Herring*. In that decision, this court approved a procedure recommended by the American Bar Association for dealing with publicity which occurs during the trial. Under this procedure, when material disseminated during the trial "goes beyond the record" of the trial and "raises serious questions of possible prejudice", the trial court is to inquire of each juror about his or her possible exposure to the material out of the presence of other jurors. 568 F.2d at 1104.

[9] Interpreting this standard, the *Herring* panel held that a trial judge must conduct a two-step threshold inquiry before determining whether this individual examination is warranted. *Id.* First, the court must decide whether the matter goes beyond the record and is seriously prejudicial in content. This inquiry includes consideration of the harmfulness of the publicity, whether it speculates on guilt or innocence and whether it was disseminated at a critical moment during the trial. *Id.* Second, the trial judge is to determine the likelihood that the material reached the jury. 568 F.2d at 1105. This inquiry goes to the trial judge's success in insulating the jury, the contents of his instructions and the regularity with which he gave them. *Id.* If the threshold questions are answered in the affirmative and reveal that the prejudicial information has possibly reached the jury, the court must conduct an individual inquiry. *See id.*

In the instant case, the court in denying the request for an individual examination, relied in effect on a negative answer to the second threshold inquiry of the *Herring* test. The trial judge reasoned that he had instructed the jury not to read anything about the trial, they had followed these instructions and if they had read the article, a collective inquiry would reveal it.[7] This manifested the court's belief that the material had not been disseminated to the jury, a conviction that was confirmed by the jurors' negative responses to the court's questions. Thus under the *Herring* test, the court was not required to proceed further and conduct an individual examination.

7. Defense counsel Marger and the district judge engaged in the following colloquy:

> Mr. Marger: Obviously, your honor, in regard to this jury, they have shown when asked the question—You have advised them not to read any article—they have shown some strong hesitancy in indicating that they had. And I believe the response at this time will be identical. In light of your admonition, very few, if any, will admit that they have read it. But an individual voir dire—
>
> The court: Let me say this to you, Mr. Marger. I have far more confidence in our jurors than that. They have been candid and honest with the Court during the individual voir dire. They were instructed not to read, listen to, or hear anything about it, scrupulously, to a man and a woman, to follow those instructions. Now what they had read previously brings up another subject, so I intend to inquire of them individually—I mean as a group—to find out what kind of response we have got.
>
> (R. 16, pp. 9-10)

[10] appellants claim as their final major contention that the prosecutor commented in his closing argument on appellants' failure to testify.[8] The allegedly impermissible remark followed the Assistant U. S. Attorney's discussion of the defendants' failure to cooperate with law enforcement officers and was as follows:

> Now its a shame that we have to call Bobby Vines in here. That is a shame. But Bobby Vines at least took the stand and told us what happened. These other guys had the opportunity—

(Supp.R. 11, p. 196).

When he said "these other guys had the opportunity" the prosecutor gestured with his hand in the direction of the defendants seated in the courtroom. Defense counsel immediately objected on the ground that the remark constituted a comment on the silence of the accused. The trial judge did not make a ruling. Rather, the prosecutor explained his statement as directed at the defendants' willingness to commit the offenses and their reluctance to assist the government. He then continued his argument.

[11] The criterion by which a prosecutorial statement is appraised to determine if it constitutes a comment on the accused's silence at trial is whether it can be inferred that the prosecutor's manifest intention was to comment upon the accused's failure to testify or his comment was of such a character that the jury would naturally understand it to be a comment on the accused's failure to testify. *United States v. Ward*, 552 F.2d 1080, 1083 (5th Cir. 1977); *United States v. White*, 444 F.2d 1274, 1278 (5th Cir. 1971).

[12] Viewed in its naked form apart from the remainder of the closing argument, the prosecutor's statement, when combined with his gesture, appears perhaps to be a remark on the defendants' failure to take the stand. A reading of the closing argument in its entirety, however, reveals that the statement was merely part of the prosecutor's rebuttal argument that the defendants had the opportunity to cooperate with law enforcement officials after their arrest but declined to do so.

Defense counsel devoted a significant portion of their closing arguments to attacking Vines' credibility in his posture as informer and witness for the government. The rhetorical question of why Vines was testifying at trial for the prosecution was repeatedly raised. The defense was entrapment and counsel wished to convince the jury that Vines induced the defendants to join the conspiracy. In his closing statement, the Assistant U. S. Attorney, as a means of showing the defendants' predisposition to commit the crime, attempted to contrast their refusal to assist federal law enforcement officials with Vines' cooperation. The argument leading up to the statement at issue was as follows:

> Mr. Modesitt: I clearly stated and I will clearly state it again that no one, when they were being enticed in this thing, indicated, hey, look, I don't want to participate. I'm a lawabiding citizen. Everyone readily went into it. No indication that they were going to tell the police or become an informant. Now isn't it interesting, Mr. Mann, representing Chris Goodwin, came in here and he asked you why is Bobby Vines testifying. Well, why didn't Chris Goodwin when he had four big *opportunities* a long time ago, you know, back in February and April and all the times that we indicated he was interviewed by as many as five law enforcement officers, why didn't he say okay, you want me to testify, I will tell you everything that happened". No, he lied. He lied everytime. The officers went to him because they could locate him and they thought he was involved. And on three occasions he lies to them. They go to Steve Long because he was involved a long time ago and Steve Long lied to them.
>
> And they went to Bill Epperson, because they thought he was involved, and Bill Epperson lied to them.
>
> Now its a shame that we have to call Bobby Vines in here. That is a shame. But Bobby Vines at least took the stand and told us what happened. These other guys had the opportunity. (Emphasis added)

(Supp.R. 11, pp. 195–96).

[13] It is clear that the prosecutor was referring to the overall conduct of the defendants during the investigation, not to their refusal to testify at trial. By his reference to "opportunity" and "opportunities" he meant the defendants' chances to exculpate themselves from the conspiracy by cooperating with federal officials. In sum, we neither believe that the prosecutor intended to comment on defendants' silence at *trial* nor that the jury construed the remarks to have this meaning.[9]

Long and controversial trials made difficult by multiple defendants and substantial community pressures may easily produce, from their sheer complexity alone, errors of constitutional magnitude. Persuaded as we are that no such error occurred in this case and that appellants received a fair trial, we affirm the judgments of conviction.

AFFIRMED.

8. Also challenged are other statements made by the prosecutor, particularly comments made in his opening statement concerning the Lukefahrs' marijuana offenses in Louisiana. The prosecutor gave notice before trial that he intended to introduce evidence of this criminal behavior to show motive, plan, intent, and identity, as permitted by Fed.Rules of Evidence 404(b). Prior to trial, defendants filed a motion in limine to exclude this evidence. Thereafter, the trial judge's law clerk verbally informed both parties that all pretrial motions were denied. Thus, the prosecutor made his argument with the good faith belief that the evidence was admissible. No reversible error was committed. The allegations as to other statements made at trial by the prosecutor are equally without merit.

9. In addition, appellant Capo claims his conviction was founded on insufficient evidence. Measured by the principles established in *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1941), the evidence adduced against him amply supported a guilty verdict.

UNITED STATES of America, Plaintiff-Appellee,

v.

Manuel Carrasco RIVERA, Defendant-Appellant.

No. 78-5444.

United States Court of Appeals, Fifth Circuit.

May 24, 1979.

The United States District Court for the Western District of Texas, William S. Sessions, J., convicted defendant of possession of marijuana, and defendant appealed. The Court of Appeals, Ingraham, Circuit Judge, held that: (1) customs patrol officers had reasonable suspicion that vehicles were being used to transport contraband, and thus stop of vehicles was legal, and (2) officers had probable cause to search vehicles.

Affirmed.

1. Customs Duties ⇐126
Searches and Seizures ⇐3.3(6)

Customs patrol officers are not like local or state police, general guardians of the public peace, but are authorized to prevent importation of aliens and contraband into the United States; they have broad statutory authority to stop and search vehicles for aliens and contraband. 19 U.S.C.A. § 482; Tariff Act of 1930, §§ 581, 582, 19 U.S.C.A. §§ 1581, 1582.

2. Searches and Seizures ⇐7(10)

Fourth Amendment circumscribes authority of customs patrol officers to stop and search vehicles. U.S.C.A.Const. Amend. 4.

Supreme Court, U. S.
FILED
SEP 24 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1979

NO. 79-391

DAVID LEE LUKEFAHR,
STEPHEN DALE LUKEFAHR,
THOMAS P. LUKEFAHR
a/k/a THOMAS JAMES DAVISON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX J TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EDWIN MARGER
DIANE E. MARGER
Law Offices of Edwin Marger
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Atlanta, Georgia 30339
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ATTORNEYS FOR PETITIONERS

IN THE SUPREME COURT
OF THE
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APPENDIX J

Opinion, United States v. Capo,

595 F.2d 1086 (5th Cir. 1979)

(595 F.2d 1086)

UNITED STATES of America,
Plaintiff-Appellee,

v.

David Floyd CAPO, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

David Lee LUKEFAHR, Stephen Dale Lukefahr and Thomas James Davison, a/k/a Thomas Lukefahr,
Defendants-Appellants.

Nos. 78-5244, 78-5279.

United States Court of Appeals,
Fifth Circuit.

May 24, 1979.

Rehearing and Rehearing En Banc Denied July 10, 1979.

Defendants were convicted in the United States District Court for the Northern

(595 F.2d 1087)

District of Florida, William H. Stafford, J., of conspiracy to possess marijuana and possession of marijuana, and they appealed. The Court of Appeals, Gewin, Circuit Judge, held that: (1) evidence did not establish degree of pervasive

community prejudice which would warrant presumption of jury prejudice; (2) procedural safeguards taken by court, including vigorous voir dire examination and instructions not to discuss case with anyone or read or listen to any news account about matter, produced fair and disinterested panel of jurors; (3) collective questioning of jury was adequate tool to detect prejudice resulting from newspaper article published during trial; (4) although viewed apart from remainder of closing argument, prosecutor's statement, combined with gesture, appeared to be remark on defendants' failure to take stand, reading of closing argument in its entirety indicated that reference was to overall conduct of defendants during investigation, not to their refusal to testify at trial, and (5) evidence was sufficient to support guilty verdict.

Affirmed.

1. Criminal Law Key #633(1)

Claims founded on prejudicial pretrial publicity must be assessed in accordance with due process standards entitling criminal defendant not to trial by body of jurors ignorant of all facts surrounding case, but to impartial jury which will render verdict based exclusively upon evidence presented in court. U.S.C.A. Const. Amends. 5, 14.

2. Criminal Law Key #1134(10)

In determining whether fair and unbiased jury was empaneled, appellate court is obligated to make independent evaluation of the special circumstances involved in the case.

3. Constitutional Law Key #268(7)

Generally, defendant, in order to establish deprivation of due process, must show that potential jurors were actually prejudiced by pretrial publicity; although burden of proof requires a showing that community prejudice actually invaded the jury box infecting opinions of the prospective jurors, if defendant proffers evidence of pervasive community prejudice in form of highly inflammatory publicity or intensive media coverage, prejudice is presumed and there is no further duty to establish actual bias. U.S.C.A. Const. Amends. 5, 14.

4. Criminal Law Key #126(1)

Where outside influences affecting community's climate of opinion as to a defendant are inherently suspect, resulting probability of unfairness requires suitable procedural safeguards, such as change of venue, to assure fair and impartial trial.

5. Criminal Law Key #134(1)

Evidence did not establish degree of pervasive community prejudice which would warrant presumption of jury prejudice in prosecution for possession of marijuana and conspiracy to possess marijuana.

6. Jury Key # 131(10)

Procedural safeguards taken by court, including vigorous voir dire examination of suspected jurors and instruction to jurors that they were not to discuss case with anyone or read or listen to any news accounts about the

(595 F.2d 1087, cont'd.)

matter, produced fair and disinterested panel of jurors in prosecution for conspiracy to possess marijuana and possession of marijuana.

7. Jury Key #131(13)

Given pretrial safeguards instituted by trial judge to ensure fair jury and judge's careful warnings to ignore press accounts delivered at every recess, collective questioning of jury was adequate tool through which to detect prejudice resulting from publication of newspaper article during trial.

8. Jury Key #131(13)

If material disseminated during trial goes beyond record of trial and raises serious questions of possible prejudice, trial court is to inquire of each juror about his or her possible exposure to material out of the presence of other jurors.

9. Jury Key #131(13)

Where court's belief that material published by newspaper during trial had not been disseminated to jury was confirmed by jurors' negative responses to court's questions, court was not required to proceed further in conducting individual examination of jurors.

10. Criminal Law Key #703

Where prosecutor gave notice just before trial that he intended to introduce evidence of

defendants' criminal behavior to show motive, plan, intent, and identity, and where prosecutor and defendants were verbally informed that all pretrial motions, including defendants' motion in limine, were denied, prosecutor's opening argument including statements concerning defendants' marijuana offenses in Louisiana was made in good-faith belief that evidence concerning such offenses was admissible in prosecution for possession of marijuana and conspiracy to possess marijuana in Florida. Fed.Rules Evid. rule 404(b), 28 U.S.C.A.

11. Criminal Law Key #721(3)

Criterion by which prosecutorial statement is appraised to determine if it constitutes comment on defendant's silence at trial is whether it can be inferred that prosecutor's manifest intention was to comment upon defendant's failure to testify or if comment was of such a character that jury would naturally understand it to be a comment on defendant's failure to testify.

12. Criminal Law Key #721(3)

Although viewed in naked form apart from remainder of closing argument, prosecutor's statement, when combined with gesture, appeared to be remark on defendants' failure to take stand, reading of closing argument in its entirety indicated that reference was to overall conduct of defendants during investigation, not to the refusal to testify at trial; thus, prosecutor neither intended to comment on defendants' silence at trial, nor did jury construe remarks to have such meaning.

(595 F.2d 1088, cont'd.)

13. Conspiracy Key #47(12)

Drugs and Narcotics Key #123

Evidence was sufficient to support guilty verdict on charges of conspiracy to possess marijuana and possession of marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§401(a)(1), 406, 21 U.S.C.A. §§841(a)(1), 846.

Ken Davis, James P. Judkins, Tallahassee, Fla., for defendant-appellant in No. 78-5244.

Nicholas P. Geeker, U. S. Atty., Pensacola, Fla., Donald S. Modesitt, Asst. U. S. Atty., Tallahassee, Fla., for plaintiff-appellee.

Edwin Marger, Diane E. Marger, Atlanta, Ga., for defendant-appellant in No. 78-5279.

Appeals from the United States District Court for the Northern District of Florida.

Before GEWIN, HILL and FAY, Circuit Judges.

GEWIN, Circuit Judge:

David Capo and brothers David Lukefahr, Stephen Lukefahr and Thomas Lukefahr were tried with four other defendants by a jury on one count of conspiracy to possess marijuana and one count of possession of marijuana in violation of 21 U.S.C. §846 and 21 U.S.C. §841(a)(1). The jury convicted appellants but their four codefendants were acquitted.

Capo was sentenced to 4 years imprisonment, 2 years parole and a $10,000 fine on the conspiracy count, and 3 years imprisonment for possession, the sentences to be served consecutively. The Lukefahrs each received consecutive 5 year sentences and $15,000 fines on each count. On this appeal, appellants claim they were denied a fair trial by virtue of prejudicial pre-trial publicity, prejudicial publicity during the trial and prosecutorial misconduct. After giving careful attention to each of these contentions, we believe appellants were afforded due process and accordingly affirm.

(595 F.2d 1089)

This case arose from a drug smuggling conspiracy which culminated tragically in the brutal gangland-type murders of four people. In 1976 a government informer, Bobby Joe Vines, planned a drug smuggling operation with a large number of men, including appellants.[1] The conspirators decided to load a large shrimp boat with marijuana and import it into the United States by landing and unloading the boat at the Sandy Creek area near Panama City, Florida.

On Sunday night, January 23, 1977, the plan was put into effect. The conspirators

1. Fifteen alleged conspirators were indicted.

landed at Sandy Creek a seventy foot shrimp boat laden with tons of marijuana. As they were unloading the vessel, two men and two young women, ages 14 and 16, happened innocently onto the scene. Apparently one of the men recognized some of the smugglers. He was shot and killed and the conspirators then fatally shot his three companions. The bodies were taken to a location in Taylor County, Florida, wired to concrete and dumped into a deep sinkhole. These crimes were termed the "sinkhole murders" by the media.

After arrest state murder charges as well as federal charges were filed against appellants. While their trials on the state charges were pending, they were tried in federal court with the four alleged co-conspirators. After appellants were convicted in the instant case, the state charges against them were dropped. According to the briefs of two of the four co-defendants who were acquitted of the federal charges were subsequently convicted in state court of first degree murder and sentenced to death.

The trial in the instant case began in January 1978 and consumed 28 days, 10 of which were expended on pre-trial voir dire examination of prospective jurors. The voir dire revealed that as a result of media coverage of the smuggling operation and the sinkhole murders, a significant percentage of the prospective jurors, estimated at 90% by appellants, possessed at least minimal knowledge of the murders, evidence of which was obviously

inadmissible in the federal trial, and the connection between the slayings and the drug offenses allegedly committed by appellants. [2]

Prior to trial counsel for appellants repeatedly moved pursuant to Federal Rules of Criminal Procedure 21(a) for a change of venue on grounds that the prospective jurors were prejudiced by the pre-trial publicity. The district court denied the motion. Appellants exhausted their peremptory challenges and requested additional strikes, asserting the same grounds. The trial judge refused to grant this request. Appellants' counsel also challenged both the entire venire and individual veniremen for cause on grounds of their knowledge of the prejudicial information. The court granted ten individual challenges for cause during voir dire

2. In the three months preceding trial, approximately twenty-one stories concerning the offenses were published in the Tallahassee Democrat, the city's largest newspaper. It was determined at voir dire that six jurors had daily subscriptions to the Democrat and that four members purchased it on a regular basis. Moreover, it was shown that since the occurrence of the offenses, a local television station had run 120 different news reports linking the murders and the drug offenses. During these newscasts, the word "Murder" surrounded by a red patch, symbolizing blood, was flashed on the screen. It was estimated that each newscast reached over 200,000 people.

but denied the others. At the conclusion of the voir dire, a jury of 12 was selected. Each juror had some slight knowledge of the sinkhole murders but each also had repeatedly pledged his or her impartiality during the voir dire examination.

Appellants present three primary arguments for this court's review. First, they assert that the prejudicial pretrial publicity required the trial judge to grant their motions for change of venue or alternatively, the challenges for cause or requests for additional peremptory strikes. It is appellants' contention that these procedural safeguards were necessary to protect their rights to a fair trial against the prejudice arising from exposure of an alleged 90% of the venire and all of the jurors to local

media coverage linking the sinkhole murders to appellants' alleged offenses.

[1] Claims founded on prejudicial pretrial publicity must be assessed in accordance with the due process standards established in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). The Supreme Court in that decision held that the Constitution entitles a criminal defendant not to a trial by a body of jurors ignorant of all facts surrounding the case, but to an impartial jury which will render a verdict based exclusively on the evidence presented in court. 366 U.S. at 722-23, 81 S.Ct. at 1642-1643.

> It is not required, however, that jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have informed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id.

[2-4] In determining whether a fair and unbiased juror was empaneled, an appellate court is obligated to make an independent evaluation of the special circumstances involved in the case. United States v. Williams, 568 F.2d 464, 469 (5th Cir. 1978); United States v. Williams, 523 F.2d 1203, 1208 (5th Cir. 1975). It has long been recognized as a general rule that a defendant, in order to establish a deprivation of due process, must show that potential jurors were actually prejudiced by the pretrial publicity. Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Calley v. Callaway, 519 F.2d 184, 204 (5th Cir. 1975); Gordon v. United States, 438 F.2d 858, 874 (5th Cir. 1971).[3] This burden of proof requires a showing that community prejudice actually invaded the jury box infecting the opinions of the prospective jurors. United States v. Williams, 523 F.2d 1203, 1208 (5th Cir. 1975). However, when the defendant proffers evidence of pervasive community prejudice in the form of highly inflammatory publicity or intensive media coverage, prejudice is presumed and there is no further duty to establish actual bias. Murphy v. Florida, 421 U.S. 794, 798-99, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600; Estes v. Texas, 381 U.S. 532, 542-43, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); Pamplin v. Mason, 364 F.2d 1, 4-5 (5th Cir. 1966). As this court stated in Pamplin:

3. The Supreme Court in Irvin articulated the requirement thusly:

> [T]he test is 'whether the nature and strength of the opinion formed are such as in law necessarily * * * raise the presumption of partiality. The question thus presented is one of mixed law and fact * * * .' [citation omitted.] 'The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside * * * .'

366 U.S. at 723, 81 S.Ct. at 1643.

> Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.

364 F.2d at 5. The cases in which such presumptive prejudice has been found are those where prejudicial publicity so poisoned the proceedings that it was impossible for the accused to receive a fair trial by an impartial jury. The clearest paradigms of such pervasive publicity were the trials in Estes and Sheppard wherein the press saturated the community with sensationalized accounts of the crime and court proceedings, and was permitted to overrun the

courtroom, transforming the trial into an event akin to a three-ring circus.[4]

4. Similarly, in Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), a confession illegally obtained from the defendant by the police was filmed by a local television station and broadcast three times in the community where the crime and the trial occurred. The Court held that the widespread dissemination of this highly damaging material rendered the defendant's trial nothing more than "a hollow formality." 373 U.S. at 726, 83 S.Ct 1417. No showing of actual jury prejudice was required.

[5] Having reviewed the record and exhibits, we do not believe that appellants were subjected to prejudicial publicity of such a magnitude that it dominated the proceedings and reduced the trial to a mockery of justice. The trial was held at Tallahassee over 100 miles from Sandy Creek, the site of the crimes, and some distance from the sinkholes where the bodies were discovered. It began almost a year after the occurrence of the alleged offenses. By this time, local news coverage of the conspiracy and the murders had subsided substantially. This is evidenced by the fact that at voir dire most of the prospective jurors and many of the jurors had only a vague recollection of the events that had transpired at Sandy Creek.[5]

5. For example, juror Bradwell stated during voir dire that she had read only one or two articles on the sinkhole murders and had not read any recently. Although she drew some connection between the sinkhole murders and the instant case, she could not recall any of the defendants' names (Supp.R. 4, p. 142). Juror Overstreet stated that she thought there was some connection between the instant case and the sinkhole murders but did not remember any details of the murders. (R. 9, p. 73). Juror Cato stated that although she remembered the sinkhole murders, she recalled only that some "young people were involved" and could not remember the names of any of the alleged perpetrators to the crime. (Supp.R. 4, p. 49, 56). She further said that she did not associate that occurrence with the instant case or with the defendants. (Supp.R. 4, p. 49-50).

(595 F.2d 1091, cont'd.)

Moreover, most of the prospective jurors could not recall the name of any person who was accused of participating in the offenses. Given these facts, we fail to perceive the degree of pervasive community prejudice which would warrant a presumption of jury prejudice.

[6] Appellants also have failed to show any prejudice in fact. Rather, the record discloses that the district court took elaborate measures to ensure that an impartial jury was empaneled.

At the commencement of the proceedings, the court conducted a collective voir dire of all prospective jurors, inquiring as to their ability to render an impartial verdict. The veniremen were carefully instructed to decide the case strictly on the evidence presented at trial. The trial judge further admonished them not to discuss the case with anyone, including family members, and not to read any newspaper articles concerning the trial or listen to radio or television accounts of the proceedings.

5, cont'd. The only knowledge juror Golden had about the sinkhole murders was that some bodies had been found in a sinkhole. (R. 8, p. 13). He said he knew nothing about the smuggling operation (R. 8, p. 32). Nor did the name Sandy Creek mean anything to him. (R. 8, p. 13). These and the other jurors stated emphatically that their limited knowledge of the murders would not affect their deliberations and final verdict.

(595 F.2d 1091, cont'd.)

The court then conducted an individual voir dire of each of the 73 prospective jurors in camera in the presence of defense counsel. During the voir dire the trial judge propounded those questions requested by the defense. Each juror was questioned at length concerning the extent of his or her knowledge of the sinkhole murders, the details surrounding the crime, including the victims' ages, and the names of the alleged perpetrators. Each juror was then questioned repeatedly whether he or she had formulated any preconceived notions on the basis of this knowledge and whether he or she was capable of rendering a fair nd impartial verdict based on the evidence. Most of the potential jurors who were cognizant of the murder repeatedly professed their impartiality and that they had no fixed impression or opinion as to guilt or innocence. Some ten of the veniremen who appeared to have an opinion were challenged and dismissed for cause.

(595 F.2d 1092)

Throughout the arduous 10 day process, the trial judge continually warned the jurors individually and collectively, at the completion of each day, that they were not to discuss the case with anyone or read or listen to any news accounts about the matter. After the completion of voir dire and the striking of a jury, the court repeated these warnings and continued to do so at each recess throughout the 28 day trial.

We are satisfied that the procedural safeguards taken by the court produced a fair and disinterested panel of jurors. [6] In reaching this conclusion, we certainly cannot ignore the jury's acquittal of four of the defendants, two of whom, according to the briefs on file, were subsequently convicted of first degree murder.

6. Appellants argue for the adoption of §§ 3, 4(b), ABA Standards for Fair Trial and Free Press as a supervisory power standard to guide federal courts in dealing with prejudicial pre-trial publicity. This recommended rule reads as follows:

> A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession or other incriminating matters, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind.

We note initially that at least one circuit has refused to invoke its supervisory powers to adopt a pre-trial publicity standard. United States v. Haldeman, 181 U.S.App.D.C. 254, 559 F.2d 31, 62-63 (1976). We likewise are hesitant to do so in this case where the trial court took appropriate measures, including a vigorous voir dire and repeated instructions, to minimize jury exposure to publicity and ferret out any possible prejudice. Moreover, the ABA criterion, which could be interpreted to disqualify jurors for

While this end result is not dispositive of the question of jury prejudice, it does support the trial judge's conclusion that the jurors were unbiased. Viewing the circumstances as a whole, this court is convinced that appellants' due process rights were preserved in the selection of the jury.

[7] As their second contention, appellants claim that the trial court failed to properly determine the jury's exposure to a prejudicial newspaper article which was published and disseminated during the trial. On the third day of trial, Monday, February 13, 1978, appellants' counsel offered into evidence outside of the jury's presence a newspaper article which had appeared as the headline story in the Saturday, February 11, edition of the Tallahassee Democrat. The article's headline read "Convicts lived it up here while they could" and a sub-

6, cont'd. minimal exposure to prejudicial matter,

> conflicts with longstanding federal policy embodied in Fed.Rules Crim.Proc. 21(a). That rule states that a change of venue is to be granted for prejudicial pretrial publicity if "there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial... in that district." This court questions whether a supervisory standard based on miminal exposure is essential to preserving an accused's right under Irvin to an impartial jury.

headline stated, "Witness recounts threat on life, p. 1B." The article related that the Lukefahr brothers had been convicted in Louisiana on marijuana offenses and were serving prison sentences in that state when they were brought to Tallahassee on a prison furlough to stand trial. The essence of the article was that upon the Lukefahrs' arrival in Florida, they were released, by mistake, from the custody of federal marshals and consequently resided for a number of days at plush hotels in the Tallahassee area.

Appellants' counsel contended that the article was inherently prejudicial, and requested the court to individually make inquiry of each juror out of the presence of the other jurors to determine if any members had read the article's headlines or content. The prosecutor objected to any further voir dire examination, but the trial judge overruled this objection, stating that he would inquire of the jurors collectively whether any member had "read or heard anything about the case over the weekend." He added that if he received any affirmative responses, he would then conduct an individual inquiry in camera. The jury was brought in and the trial judge reminded the panel of his previous instructions to not to listen, read or talk about the case. The jurors were then asked three separate times whether they had read any headlines or articles over the weekend about the trial or

watched any television accounts. Each time the Court phrased the question differently.

Each time the jurors replied in the negative. The trial judge then proceeded with the trial.

According to appellants, this collective inquiry did not suffice. They assert that the federal supervisory standard adopted by a panel of this circuit in United States v. Herring, 568 F.2d 1099 (5th Cir. 1978), requires an individual examination in all cases of publicity occurring during the trial. We disagree. Given the pretrial safeguards instituted by the trial judge to ensure a fair jury and his careful warnings to ignore press accounts delivered at every recess, the collective questioning of the jury was an adequate tool through which to detect prejudice. In addition, in its final instructions to the jury, the court again scrupulously admonished the jurors to "not let sympathy or bias or prejudice influence" them "in any way", and to consider only the evidence presented in court and "not consider, refer to, nor discuss any fact or circumstance except the evidence" admitted at trial. Appellants in our view were fully protected from any possible prejudice.

[8] Furthermore, the voir dire fully satisfied the requirements of Herring. In that decision, this court approved a procedure recommended by the American Bar Association for dealing with publicity which occurs during the trial. Under this procedure, when material disseminated during the trial "goes beyond the record" of the trial and "raises serious questions of possible prejudice", the trial court is to inquire of each juror about his or her possible exposure to the material out of the presence of other jurors. 568 F.2d at 1104.

[9] Interpreting this standard, the Herring panel held that a trial judge must conduct a two-step threshold inquiry before determining whether this individual examination is warranted. Id. First, the court must decide whether the matter goes beyond the record and is seriously prejudicial in content. This inquiry includes consideration of the harmfulness of the publicity; whether it speculates on guilt or innocence and whether it was disseminated at a critical moment during the trial. Id. Second, the trial judge is to determine the likelihood that the material reached the jury. 568 F.2d at 1105. This inquiry goes to the trial judge's success in insulating the jury, the contents of his instructions and the regularity with which he gave them. Id. If the threshold questions are answered in the affirmative and reveal that the prejudicial information has possibly reached the jury, the court must conduct an individual inquiry. See id.

In the instant case, the court in denying the request for an individual examination, relied in effect on a negative answer to the second threshold inquiry of the Herring test. The trial judge reasoned that he had instructed the jury not to read anything about the trial, they had followed these instructions and if they had read the article, a collective inquiry would reveal it. This manifested the court's belief

7. Defense counsel Marger and the district judge engaged in the following colloquy:
Mr. Marger:...Obviously, your honor, in regard to this jury, they have shown when asked the ques-

that the material had not been disseminated to the jury, a conviction that was confirmed by the jurors' negative responses to the court's questions. Thus under the Herring test, the court was not required to proceed further and conduct an individual examination.

7, cont'd. tion-You have advised them not to read any article-they have shown some strong hesitancy in indicating that they had. And I believe the response at this time will be identical. In light of your admonition, very few, if any, will admit that they have read it. But an individual voir dire-The Court: Let me say this to you, Mr. Marger. I have far more confidence in our jurors than that. They have been candid and honest with the Court during the individual voir dire. They were instructed not to read, listen to, or hear anything about it, scrupulously, to a man and a woman, to follow those instructions. Now what they had read previously brings up another subject, so I intend to inquire of them individually-I mean as a group-to find out what kind of response we have got. (R. 16, pp. 9-10).

[10] appellants claim as their final major contention that the prosecutor commented in his closing argument on appellants' failure to testify. The allegedly impermissible remark followed the Assistant U. S. Attorney's discussion of the defendants' failure to cooperate with law enforcement officers and was as follows:

> Now its a shame that we have to call Bobby Vines in here. That is a shame. But Bobby Vines at least took the stand and told us what happened. These other guys had the opportunity-

(Supp.R. 11, p. 196).

8. Also challenged are other statements made by the prosecutor, particularly comments made in his opening statement concerning the Lukefahrs' marijuana offenses in Louisiana. The prosecutor gave notice before trial that he intended to introduce evidence of this criminal behavior to show motive, plan, intent, and identity, as permitted by Fed.Rules of Evidence 404(b). Prior to trial, defendants filed a motion in limine to exclude this evidence. Thereafter, the trial judge's law clerk verbally informed both parties that all pretrial motions were denied. Thus, the prosecutor made his argument with the good faith belief that the evidence was admissible. No reversible error was committed. The allegations as to other statements made at trial by the prosecutor are equally without merit.

(595 F.2d 1094, cont'd.)

When he said "these other guys had the opportunity" the prosecutor gestured with his hand in the direction of the defendants seated in the courtroom. Defense counsel immediately objected on the ground that the remark constituted a comment on the silence of the accused. The trial judge did not make a ruling. Rather, the prosecutor explained his statement as directed at the defendants' willingness to commit the offenses and their reluctance to assist the government. He then continued his argument.

[11] The criterion by which a prosecutorial statement is appraised to determine if it constitutes a comment on the accused's silence at trial is whether it can be inferred that the prosecutor's manifest intention was to comment upon the accused's failure to testify or his comment was of such a character that the jury would naturally understand it to be a comment on the accused's failure to testify. United States v. Ward, 552 F.2d 1080, 1083 (5th Cir. 1977); United States v. White, 444 F.2d 1274, 1278 (5th Cir. 1971).

[12] Viewed in its naked form apart from the remainder of the closing argument, the prosecutor's statement, when combined with his gesture, appears perhaps to be a remark on the defendants' failure to take the stand. A reading of the closing argument in its entirety, however, reveals that the statement was merely part of the prosecutor's rebuttal argument that the defendants had the opportunity to cooperate with law enforcement officials after their arrest but declined to do so.

Defense counsel devoted a significant portion of their closing arguments to attacking Vines' creditiblity in his posture as informer and witness for the government. The rhetorical question of why Vines was testifying at trial for the prosecution was repeatedly raised. The defense was entrapment and counsel wished to convince the jury that Vines induced the defendants to join the conspiracy. In his closing statement, the Assistant U. S. Attorney, as a means of showing the defendants' predisposition to commit the crime, attempted to contrast their refusal to assist federal law enforcement officials with Vines' cooperation. The argument leading up to the statement at issue was as follows:

> Mr. Modesitt: I clearly stated and I will clearly state it again that no one, when they were being enticed in this thing, indicated, hey, look, I don't want to participate. I'm a lawabiding citizen. Everyone readily went into it. No indication that they were going to tell the police or become an informant. Now isn't it interesting, Mr. Mann, representing Chris Goodwin, came in here and he asked you why is Bobby Vines testifying. Well, why didn't Chris Goodwin when he had four big opportunities a long time ago, you know, back in February and April and all the times that we indicated he was interviewed by as many as five law enforcement officers, why didn't he say

> okay, you want me to testify, I will tell you everything that happened? No, he lied. He lied everytime. The officers went to him because they could locate him and they thought he was involved. And on three occasions he lies to them. They go to Steve Long because he was involved a long time ago and Steve Long lied to them.
>
> And they went to Bill Epperson, because they thought he was involved, and Bill Epperson lied to them.
>
> Now its a shame that we have to call Bobby Vines in here. That is a shame. But Bobby Vines at least took the stand and told us what happened. These other guys had the opportunity. (Emphasis added)

(Supp.R. 11, pp. 195-96).

[13] It is clear that the prosecutor was referring to the overall conduct of the defendants during the investigation, not to their refusal to testify at trial. By his reference to "opportunity" and "opportunities" he meant the defendants' chances to exculpate themselves from the conspiracy by cooperating with federal officials. In sum, we neither believe that the prosecutor intended to comment on defendants' silence at trial nor that the

jury construed the remarks to have this meaning. [9]

Long and controversial trials made difficult by multiple defendants and substantial community pressures may easily produce, from their sheer complexity alone, errors of constitutional magnitude. Persuaded as we are that no such error occurred in this case, and that appellants received a fair trial, we affirm the judgments of conviction.

AFFIRMED.

9. In addition, appellant Capo claims his conviction was founded on insufficient evidence. Measured by the principles established in Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1941), the evidence adduced against him amply supported a guilty verdict.

Supreme Court, U. S.
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No. 79-391

In the Supreme Court of the United States

OCTOBER TERM, 1979

DAVID LEE LUKEFAHR, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. J) is reported at 595 F. 2d 1086.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1979. A petition for rehearing was denied on July 10, 1979. Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to September 8, 1979, and the petition was filed on September 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether pre-trial publicity gave rise to prejudice against petitioners that required a change of venue under Fed. R. Crim. P. 21(a).

2. Whether the voir dire conducted by the district court resulted in the selection of an impartial jury.

3. Whether the district court properly questioned the jury concerning a newspaper article published during the course of the trial.

4. Whether the prosecutor commented improperly during his summation on petitioners' exercise of their right to remain silent.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioners David Lukefahr, Stephen Lukefahr and Thomas Lukefahr, and co-defendant David Capo, were convicted on one count of conspiracy to possess marijuana and one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 846 and 841(a)(1). All three petitioners were sentenced to consecutive five-year prison terms and a fine of $15,000 on each count. The court of appeals affirmed (Pet. App. J).

The evidence presented at trial, the sufficiency of which is not in dispute, showed that petitioners participated in a conspiracy to smuggle marijuana into the United States. They executed the plan in January 1977 by landing a 70-foot shrimp boat, laden with several tons of marijuana, on the Florida panhandle coast. Petitioners thereafter participated in the process of unloading the vessel (Pet. App. J-3).

During the course of the unloading operation, two men and two women happened onto the scene and were fatally shot by the conspirators. Their bodies were

transported to Taylor County, Florida, wired to concrete blocks, and thereafter dumped into a deep sinkhole (Pet. App. J-3).[1]

Prior to trial, counsel for petitioners moved for a change of venue pursuant to Fed. R. Crim. P. 21(a), contending that prospective jurors had been prejudiced by pre-trial publicity. At the hearing on this motion, petitioners tendered certain media reports describing the smuggling operation and related murders. The district court denied the motion (Pet. App. J-3).

Prior to the commencement of trial, the district court undertook an exhaustive voir dire examination extending over 10 days. Each potential juror was questioned individually in camera by the court, and counsel were invited to submit additional questions when the court's examination was completed. During the course of this examination, petitioners exercised all of their peremptory challenges and the court granted 10 additional challenges for cause directed to persons who appeared to have been prejudiced by pre-trial publicity. Each of the jurors selected had some knowledge of the sinkhole murders based on past media reports, but each repeatedly pledged his or her impartiality and ability to render a fair verdict (Pet. App. J-3).

ARGUMENT

1. Petitioners contend (Pet. 14-59)[2] that the existence of pre-trial publicity concerning their smuggling operation and the resulting murders made a fair trial impossible,

---

[1]Petitioners and their co-conspirators were subsequently indicted in state court for murder. Following their conviction in federal court, the state murder charges against petitioners were dropped. However, two other participants in the smuggling conspiracy were subsequently convicted in state court of first degree murder (*ibid.*).

[2]We address only the principal points and authorities raised in petitioners' 82 page petition, a document which fails to comply with Rule 23(4) of the Rules of this Court.

and that the district court was required to grant a change of venue without attempting to ascertain through voir dire examination whether an impartial jury could be selected. They also contend that federal standards in this area are inadequate, and that the approach of the court of appeals departs from that of other courts.

The standard governing motions for changes of venue is specified in Fed. R. Crim. P. 21(a):

> The court upon motion of the defendant shall transfer the proceeding as to him to another district * * * if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

Proper application of this standard requires an assessment of the facts of the particular case, an assessment undertaken by both courts below (see Pet. App. A-4 to A-6). Petitioners have failed to demonstrate an abuse of discretion in evaluating these facts.

Based on its review of the record and exhibits submitted by petitioners, the court of appeals concluded that no showing had been made of prejudicial publicity that would give rise to a presumption of prejudice on the part of potential jurors. The court explained (Pet. App. J-5; footnote omitted):

> The trial was held at Tallahassee over 100 miles from Sandy Creek, the site of the crimes, and some distance from the sinkholes where the bodies were discovered. It began almost a year after the occurrence of the alleged offenses. By this time, local news coverage of the conspiracy and the murders had subsided substantially. This is evidenced by the fact

> that at voir dire most of the prospective jurors and many of the jurors had only a vague recollection of the events that had transpired at Sandy Creek. Moreover, most of the prospective jurors could not recall the name of any person who was accused of participating in the offenses. Given these facts, we fail to perceive the degree of pervasive community prejudice which would warrant a presumption of jury prejudice.

The court of appeals recognized that it was obliged to make "an independent evaluation of the special circumstances involved in the case" to determine whether "highly inflammatory publicity or intensive media coverage" resulted in "presumptive prejudice" (Pet. App. J-4). However, based on its independent review, the court concluded that the present case was wholly unlike cases such as *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), and *Estes* v. *Texas*, 381 U.S. 532 (1965), in which a single defendant was the focus of highly inflammatory publicity and intensive news coverage.[3] In contrast to those cases, petitioners were only part of a 15 person conspiracy and were not the subjects of individual attention by the media. Moreover, the newspaper articles in question were objective in nature. See Pet. App. D-3 to D-5. See also *Calley* v. *Callaway*, 519 F. 2d 184, 206 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 911 (1976).[4]

---

[3]See also *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), in which a confession illegally obtained from the defendant was repeatedly broadcast by television in the community where the trial took place.

[4]Contrary to petitioners' assertion (Pet. 19), the court of appeals did not find that the pre-trial publicity was "prejudical" in nature. The court did find that publicity had been prevalent (Pet. App. J-3), but it also found an absence of resulting community prejudice that would warrant a "presumption" that careful voir dire procedures would be ineffective in screening out biased jurors.

Although petitioners argue that the press reports concerning their smuggling operation were inherently prejudicial because they included information about prior convictions and guilty pleas on similar charges (Pet. 20), the articles on which they rely do not support such contentions. Significantly, the articles (Pet App. D) do not describe petitioners by name. While the articles do mention that one of the individuals charged in the crimes (James Davison, an alias used by petitioner Thomas Lukefahr) was currently serving a jail sentence (Pet. App. D-3), the articles contain no indication that "James Davison" and "Thomas Lukefahr" are the same person. Since this fact would not otherwise be apparent to readers of the newspaper article, the problem presented in *Marshall* v. *United States*, 360 U.S. 310 (1959), in which jurors actually read articles during trial recounting the defendant's prior felony convictions, did not arise.

Petitioners also argue (Pet. 18 and *in passim*) that additional standards are required in this area and that a change of venue should be granted whenever there is a "probability of prejudice."[5] However, this standard does not appear to be materially different from the standard used by the court below, which inquired whether, based

[5]The principal authority relied on by petitioners, ABA *Standards Relating to Fair Trial and Free Press* §3.2 (1968), provides that a motion for "change of venue or continuance" shall be granted when the trial court determines that dissemination of potentially prejudicial material gives rise to "a reasonable likelihood that in the absence of such relief, a fair trial cannot be had." This discretionary standard is substantially identical to Fed. R. Crim. P. 21(a) and the case law applied by the court of appeals here. The case of *Commonwealth* v. *Casper*, 375 A. 2d 737 (Pa. Super. Ct 1977), also relied on by petitioners, simply requires a careful analysis of the special facts of the particular case, an analysis nearly identical with that undertaken here. Compare 375 A. 2d at 743 and Pet. App. J-3 to J-6.

on all the facts and circumstances of the case, pre-trial publicity was so inherently prejudicial that bias on the part of jurors must be presumed.[6]

On the facts presented in this case, the trial judge did not abuse his discretion by denying petitioners' motion for a change of venue and by proceeding to determine if an unbiased jury panel could be selected through customary voir dire procedures. See *United States* v. *Gullion*, 575 F. 2d 26 (1st Cir. 1978); *United States* v. *Haldeman*, 559 F. 2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); *United States* v. *Jones*, 542 F. 2d 186 (4th Cir.), cert. denied, 426 U.S. 922 (1976); *Pamplin* v. *Mason*, 364 F. 2d 1, 6 n.9 (5th Cir. 1966). As the court of appeals observed in *United States* v. *Haldeman*, *supra*, 559 F. 2d at 63; footnote and emphasis omitted: "[A] supervisory fair trial standard, however stated, could not stimulate the court to additional vigilance in protecting the defendant's right to be tried on the evidence presented in court. And if an impartial jury actually cannot be selected, that fact should become evident at voir dire." See also *Dobbert* v. *Florida*, 432 U.S. 282, 301-303 (1977), rejecting the contention that the "quantum of publicity" surrounding the defendant's offense made it impossible to select a fair and impartial jury.

2. Petitioners also argue that the jury was biased because its members had some knowledge of the murders which resulted from their drug smuggling activities. In these circumstances, petitioners contend, the trial court should not have relied on assurances from the jury that they could render an impartial verdict (Pet. 45-47).

[6]Although petitioners contend that the court of appeals applied a "mockery of justice" standard in this case (Pet. 3), it is clear that the court merely used that expression in the course of analyzing the facts presented here and contrasting this case with other cases in which pre-trial publicity was alleged to have resulted in a total miscarriage of justice. See *Murphy* v. *Florida*, 421 U.S. 794, 799 (1975).

However, it is well settled that a defendant is not entitled to a trial by a body of jurors ignorant of all facts surrounding the case, a standard that would be impossible to achieve in many instances. Rather, the defendant is entitled to receive a trial from an impartial jury that will render a verdict based solely on the evidence presented in court. *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 (1961). No court has ever held that the only impartial jury is a jury completely ignorant of the facts surrounding a case. See *Dobbert* v. *Florida*, *supra*, 432 U.S. at 301-302. As this Court emphasized in *Irvin* v. *Dowd*, *supra*, 366 U.S. at 722-723: "In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public * * * and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases." The Court added that "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." This standard was fully satisfied here.

As explained by the court of appeals following its independent review of the facts (Pet. App. J-5):

> Appellants * * * have failed to show any prejudice in fact. Rather, the record discloses that the district court took elaborate measures to ensure that an impartial jury was empaneled.
>
> At the commencement of the proceedings, the court conducted a collective voir dire of all prospective jurors, inquiring as to their ability to render an impartial verdict. The veniremen were carefully instructed to decide the case strictly on the evidence presented at trial. The trial judge further admonished them not to discuss the case with anyone, including family members, and not to read any newspaper articles concerning the trial or listen to radio or television accounts of the proceedings.
>
> The court then conducted an individual voir dire of each of the 73 prospective jurors *in camera* * * *. During the voir dire the trial judge propounded those questions requested by the defense. Each juror was questioned at length concerning the extent of his or her knowledge of the sinkhole murders, the details surrounding the crime * * * and the names of the alleged perpetrators. Each juror was then questioned repeatedly whether he or she had formulated any preconceived notions on the basis of this knowledge and whether he or she was capable of rendering a fair and impartial verdict based on the evidence.[7]

Each of the jurors who appeared to have opinions that would impair his or her impartiality was dismissed for cause (Pet. App. J-5). Moreover, each juror who was selected to sit in this trial repeatedly stated that he or she had no opinion as to the guilt or innocence of petitioners. See 4 Supp. R. 18-24, 124-125, 144-147, 162-163; 8 R. 23, 96, 100, 104, 121; 9 R. 74, 82; 10 R. 47, 54, 82, 211, 224, 383, 392.[8] Thus, the jury selected in this case was far different from that in *Irvin* v. *Dowd*, *supra*, where eight of the 12 jurors believed prior to trial that the defendant was guilty. Here, as in *Murphy* v. *Florida*, *supra*, the exposure of the jurors to some pre-trial publicity "by no means suggests a community with

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[7] As the court of appeals noted, most of the prospective jurors could not recall the names of any of the persons who allegedly had been involved in the crimes in question (Pet. App. J-5).

[8] "Supp. R." refers to the supplemental record filed in the court of appeals; "R." refers to the original record. The volumes of the trial transcript were not numbered in consecutive order. See Pet. App. I.

sentiment[s] so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own." 421 U.S. at 803.[9]

3. Petitioners further contend (Pet. 59-77) that the trial court failed to properly question the jury panel concerning possible exposure to a newspaper article published during trial. On the third day of trial, petitioners advised the court that a newspaper article had appeared as the headline story in a local newspaper, the Tallahassee Democrat. The article's headline read "Convicts lived it up here—while they could," and a subheading stated "Witness recounts threats on life" (Pet. App. E-2). The article also discussed petitioners' prior

[9]Petitioners argue that the ABA *Standards Relating to Fair Trial and Free Press* §3.4(b)(1968), should have been applied in this case. Section 3.4(b) provides:

> A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters, that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind.

But none of the jurors who was empaneled in this case possessed "incriminating" information or information that was "inflammatory" with respect to petitioners. The voir dire examination sufficed to "ferret out any possible prejudice" of this kind (Pet. App. J-6 n.6).

Petitioners' reliance on *Silverthorne* v. *United States*, 400 F. 2d 627 (9th Cir. 1968), and *United States* v. *Williams*, 568 F. 2d 464 (5th Cir. 1978), is equally misplaced. In *Silverthorne*, the court held that a collective voir dire examination, in which prospective jurors were asked only four general questions regarding their knowledge of the case, was insufficient to assure a fair trial in a highly publicized proceeding. The 10 day individual voir dire examination in this case cannot be compared to that found deficient in *Silverthorne*. In the *Williams* case, in contrast to the present case, it was established that an "inherently prejudicial" news report of the defendant's prior convictions had reached five members of the jury during the course of the trial.

convictions on drug charges. After reviewing the article, the trial judge stated that he would inquire of the jury collectively whether any member had "read or heard anything about the case over the weekend." If he received any affirmative response, he would subsequently conduct an individual inquiry in camera (Pet. App. J-6). The jurors were then brought into the courtroom and the trial judge asked them three separate times whether they had read any headlines or articles over the weekend about the trial or watched any television programs dealing with the subject. Each time the court phrased the question differently to avoid any possibility of misunderstanding. Each time the panel responded in the negative (*id.* at J-6 to J-7).

Considering the pre-trial safeguards instituted by the trial judge and his repeated examination of the panel, petitioners could not have been prejudiced by the newspaper article. Moreover, at every recess the trial judge admonished the jury to refrain from reading or listening to anything that concerned the case (*id.* at J-7.) And in his final instructions, the court again reminded the jury that the verdict must be based solely on the evidence (*ibid.*). Further inquiry of individual members of the jury panel was not required under these circumstances. See *United States* v. *Herring*, 568 F. 2d 1099, 1104-1105 (5th Cir. 1978); *United States* v. *Jones*, 542 F. 2d 186, 194 (4th Cir.), cert. denied, 426 U.S. 922 (1976).

Nor is there merit to petitioners' argument that the court was required to ignore the denial by the jury, a denial repeated three different times in response to three differently phrased questions. Despite the fact that some of the jurors subscribed to the newspaper in question, and some *prospective* jurors disregarded the court's warning against talking about the case (Pet. 64), there is no reason to discredit the repeated assurances of the panel actually selected that it had not seen the article. Here, as in *Opper*

v. *United States*, 348 U.S. 84, 95 (1954), there is no justification for indulging in "unfounded speculation that the jurors disregarded clear instructions of the court" requiring them to avoid considering extraneous matter.[10]

4. Petitioners finally contend (Pet. 78) that the prosecutor improperly commented on their post-arrest silence during closing argument. The court of appeals correctly held that, viewed in context, the prosecutor's remarks were not directed toward petitioners' silence. There is no reason for further review of this essentially factual question.

Contrary to petitioners' assertion, their counsel contended before the jury that his clients were led to commit the crimes charged against them due to the activities of Bobby Vines, a government informant (11 Supp. R. 175-178). Moreover, defense counsel devoted a significant portion of their closing argument to attacking Vines' credibility (Pet. App. J-8). In rebuttal, the prosecutor contended that Vines' testimony was truthful, and contrasted Vines with three of petitioners' co-conspirators, Chris Goodwin, Steve Long, and Bill Epperson. He observed that these three had various opportunities to exculpate themselves, to withdraw from the conspiracy, and to cooperate with the government in the same manner as Bobby Vines. Instead, however, they chose to lie to the authorities. The prosecutor argued this point to the jury as follows (Pet. App. J-8 to J-9; emphasis omitted):

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[10] *United States* v. *Lord*, 565 F. 2d 831 (2d Cir. 1977), relied on by petitioners, does not support their contrary contention. In *Lord*, the court observed that an individual voir dire may not be required if the possibility of jury exposure to an article is remote. 565 F. 2d at 838-839. Because the trial judge is in the best position to assess the possibility of jury misconduct or prejudice, his broad discretion in dealing with such problems has been emphasized repeatedly. See, *e.g.*, *United States* v. *Bufalino*, 576 F. 2d 446, 451-452 (2d Cir.), cert. denied, 439 U.S. 928 (1978); *United States* v. *Hendrix*, 549 F. 2d 1225, 1227-1229 (9th Cir. 1977).

> I clearly stated and I will clearly state it again that no one, when they were being enticed in this thing, indicated, hey, look, I don't want to participate. I'm a lawabiding citizen. Everyone readily went into it. No indication that they were going to tell the police or become an informant. Now isn't it interesting, Mr. Mann, representing Chris Goodwin, came in here and he asked you why is Bobby Vines testifying. Well, why didn't Chris Goodwin when he had four big opportunities a long time ago, you know, back in February and April and all the times that we indicated he was interviewed by as many as five law enforcement officers, why didn't he say okay, you want me to testify, I will tell you everything that happened? No, he lied. He lied everytime. The officers went to him because they could locate him and they thought he was involved. And on three occasions he lies to them. They go to Steve Long because he was involved a long time ago and Steve Long lied to them.
>
> And they went to Bill Epperson, because they thought he was involved, and Bill Epperson lied to them.
>
> Now its a shame that we have to call Bobby Vines in here. That is a shame. But Bobby Vines at least took the stand and told us what happened. These other guys had the opportunity.

When defense counsel objected to this argument as a tacit comment on their clients' failure to testify, the prosecutor explained that his statement was only directed to the defendants' predisposition to commit the offenses and their reluctance to assist the government (Pet. App. J-8).

Rather than constituting a comment on petitioners' failure to testify at trial or on their post-arrest silence, the argument of the prosecutor represented an attempt to bolster the credibility of Vines by contrasting his honest cooperation with federal officials with the misrepresentations of other members of the conspiracy. As the court of appeals found, this was responsive rebuttal argument (Pet. App. J-8 to J-9). Significantly, petitioners were not even mentioned in this part of the closing argument. It could not have been understood as a comment on their silence.

In these circumstances, petitioners' reliance on *Doyle* v. *Ohio*, 426 U.S. 610 (1976), is wholly misplaced. *Doyle* establishes that post-arrest silence following a *Miranda* warning has little evidentiary value and should not be used for impeachment purposes at trial. In this case, however, the prosecutor did not comment on petitioners' post-arrest silence following a *Miranda* warning. Instead, the prosecutor contrasted the mendacity of petitioners' co-conspirators with the honesty of a government witness. *Doyle's* concern over the "fundamental[] unfairness" (426 U.S. at 618) of advising a defendant of his right to remain silent and then using that silence against him is not applicable here.[11]

[11]Contrary to petitioners' contention, the government explained the context and meaning of the prosecutor's closing argument in its brief in the court of appeals. See Govt. Br. 33-34.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1979

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